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# Sexual Violence by Educators in South African Schools: Gaps in Accountability

University of the Witwatersrand. Centre for Applied Legal Studies

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Centre for Applied Legal Studies,  
University of the Witwatersrand School of Law

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**MAY 2014**



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Law School

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**CALS**

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**Avon Global Center for Women and Justice at Cornell Law School**

The Avon Global Center for Women and Justice at Cornell Law School works with judges, legal professionals, and governmental and non-governmental organisations to improve access to justice in an effort to eliminate violence against women and girls. For more information, please visit: [www.womenandjustice.org](http://www.womenandjustice.org).

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Established 35 years ago, the Centre for Applied Legal Studies (CALS) is a human rights non-governmental organisation based at the University of the Witwatersrand School of Law. CALS envisions a socially and economically just society where repositories of power, including the state and the private sector, respect human rights. Recognising the continuing historical legacy of apartheid, CALS endeavours to actualise a just society by challenging the structural nature of poverty and inequality and by holding to account the repositories of power that perpetuate human rights violations. CALS approaches its work through rigorous research, client engagement, advocacy, and creative lawyering. Increasingly, CALS has identified a fourth component of our work, namely, critical self-reflection to ensure that we are doing the “right work” and that we are doing the “work right.”

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The Cornell Law School International Human Rights Clinic contributes to advancing human rights by providing legal assistance to nongovernmental organisations, judges, intergovernmental bodies, and individuals. Under faculty supervision, students work on a variety of human rights projects, which involve fact-finding and reporting, domestic and international litigation, human rights education, and other methodologies. Through these activities, the Clinic seeks to strengthen the rule of law and the protection of human rights around the world.

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# Executive Summary

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In many South African schools, educators have sexually harassed and abused the learners in their care. This serious human rights violation is widespread and well known. However, its actual incidence is difficult to determine as many cases of educator-learner abuse are never reported. Such harassment and abuse – which occurs with frequency not only in South Africa but also worldwide – has devastating consequences for the health and education of the learners, mainly girls, who experience it. Over the past decade, South Africa has adopted important laws and policies to address this grave human rights problem, yet sexual violence persists in South African schools with disquieting regularity.

While there is a myriad of factors, both social and political, that contribute to school-based sexual violence, the inadequacy of structures and processes capable of ensuring educator accountability is one of the most crucial causes. Educators who sexually abuse learners often do not face meaningful consequences for their actions. Government actors and institutions are not held responsible for their failure to prevent and respond to such abuse. In the absence of accountability, there is impunity. Tragically, this enables the abuse to continue unchecked.

This report examines the gaps in accountability that exist for educator abuse of learners in Gauteng Province, South Africa. Drawing upon desk research and interviews with government officials, NGOs, police, community members, and affected individuals, it identifies and discusses the problems that contribute to the government's failure to hold abusive educators responsible for their actions and to protect and provide redress to the learners they have abused. It also situates these issues within a framework of South Africa's international, regional, and domestic legal obligations, and provides recommendations aimed at filling these gaps.

Gaps in accountability exist, in part, because of a lack of implementation of important national laws and procedures for disciplining abusive educators. In turn, this is due to inconsistencies in those laws and a lack of coordination among the institutions to which disciplinary proceedings are delegated. For example, some educators and school administrators are reluctant to report or take action against educators who sexually abuse learners, effectively silencing the learners who experienced the abuse. Moreover, if the Department of Basic Education finds an educator guilty of an alleged sexual offence but the South African Council for Educators finds the same educator not guilty, the educator will be dismissed but will not be struck off the teachers' register and may go on to teach at another school. Even if the educator is struck off the register, he or she is often free to seek employment at a private school. Moreover, within the education system, there are multiple and duplicative disciplinary processes that may lead to greater learner victimisation and the eventual withdrawal of cases. The government has produced guidelines and programs to

educate administrators, educators, and learners about sexual violence. However, schools are not legally required to adopt these guidelines, and incomplete distribution and a lack of training on their content have impeded their impact.

Gaps in accountability are also endemic within South Africa's criminal justice system, compromising its effectiveness. Issues include inadequate training of justice system actors, biased attitudes towards victims of sexual abuse, and insufficient human and financial resources to ensure effective investigations and prosecutions. For example, victims feel uncomfortable reporting cases of sexual violence to the South African Police Services, the police service lacks the resources and training to properly investigate such cases, prosecutors lack the evidence to obtain higher conviction rates, and magistrates lack the emotional support to avoid burnout. Some magistrates are resistant to receiving training in communicating with children and may question children in ways that lead to child secondary victimisation. The gaps and deficiencies at each level of the criminal justice process contribute to the re-victimization of individuals who have experienced abuse and deter reporting by future victims.

In addition, despite important efforts, the South African government has not made available to all victims of abuse a system of comprehensive, coordinated, and effective services. Civil society organisations have been compelled to fill this gap by providing medical, legal, therapeutic, and other types of services to victims and survivors of violence. However, like their government-sponsored counterparts, these organisations have been inhibited by limited resources and lack of coordination. Moreover, their efforts cannot absolve the government of its responsibility to ensure that all victims have access to specialised support that can help them address the trauma they experienced and obtain justice for the crimes committed against them.

It is imperative that the South African government act without delay to address the gaps in accountability that have enabled sexual violence by educators against learners to persist. Through its analysis and recommendations, this report seeks to inform and support these critical efforts to combat impunity and put an end to educator-learner sexual abuse in South Africa's schools.



# I. Introduction

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## A. The Problem

Sexual violence by educators against learners in South African schools is a serious human rights issue that is widespread and well known.<sup>1</sup> In a 2001 report, Human Rights Watch found that sexual violence against girls “permeates the whole of the South African education system.”<sup>2</sup> It explained that educators and other learners had subjected female learners to rape, sexual assault, offers of better grades or money in exchange for sexual favours or “dating” relationships, and other forms of abuse.<sup>3</sup> In 2006, the South African Human Rights Commission (SAHRC) noted that sexual violence, including abuse perpetrated by educators, was one of the most prevalent forms of violence identified in its hearings on violence in schools.<sup>4</sup> Moreover, in 2011, the U.N. Committee on the Elimination of Discrimination against Women (CEDAW Committee) “expresse[d] grave concern about the high number of girls who suffer sexual abuse and harassment in schools by both teachers and classmates, as well as the high number of girls who suffer sexual violence while on their way to/from school [in South Africa].”<sup>5</sup>

Sexual violence by educators against learners is a disquieting reality, impeding a learner’s personal autonomy and right to education. It also lies at the intersection of broader forms of violence, particularly sexual violence and school violence, which are prevalent in South African society. Patrick Burton, an expert on violence in South African schools, points to several factors that contribute to this phenomenon, including the following:

- There is a significant lack of awareness among educators of the processes that are meant to deal with sexual violence;<sup>6</sup>
- Schools are reluctant to take action against educators who abuse learners;<sup>7</sup>
- Local branches of the Department of Education “plead ignorance” on how to respond to sexual violence in schools;<sup>8</sup> and
- Educators’ backgrounds are not screened prior to employment, allowing abusers to enter and re-enter schools.<sup>9</sup>

The accumulation of these and other gaps results in broken and dysfunctional structures and processes which are incapable of ensuring educator accountability. In the absence of accountability, there is impunity. While there is a myriad of causes, both social and political, that fuel the phenomenon of sexual violence in schools, the absence of meaningful consequences for perpetrators lends legitimacy to their behaviour, arguably giving license to this harm. Therefore, these gaps may be a key reason why sexual violence continues to be prevalent in South African schools.

## B. Scope of the Research

The frequent occurrence of sexual violence in schools violates South Africa's international and regional law obligations. Under international human rights law, states have a responsibility to act with due diligence to prevent, investigate, punish, and provide redress for acts of gender-based violence.<sup>10</sup> This obligation applies regardless of whether the violence is perpetrated by a state actor or private persons.<sup>11</sup> It includes, moreover, a duty to establish effective structures and procedures to deal with violence.<sup>12</sup>

Thus when an educator – who, if a government school teacher, is an agent of the state – sexually abuses a learner, this act violates South Africa's obligation not to engage in acts of gender-based violence. At the same time, the abuse and the barriers that the learner may face in seeking redress represent an abrogation of South Africa's responsibility, at both an individual and systemic level, to prevent gender-based violence<sup>13</sup> and to investigate, punish, and provide a remedy where it occurs. The South African Constitution is clear about the obligation to protect against violence and to ensure the right to basic education.<sup>14</sup> Government institutions, including the national and provincial departments of education and the justice system, as well as the independent Chapter Nine institutions, all share in this responsibility and are implicated by the failure to effectively prevent or respond to sexual violence in schools.

This report identifies and discusses the gaps in educator accountability that have contributed to the continued prevalence of sexual violence in South African schools. The report focuses on educator-perpetrated sexual abuse against learners in Gauteng Province.<sup>15</sup>

Although sexual violence by learners against learners is also prevalent in South Africa, the report focuses on abuse by educators for several reasons. First, such abuse represents a devastating exploitation of trust and dependency inherent in the pedagogical relationship. There is also a clear inconsistency between the detailed regulatory framework governing prevention of and responses to educator abuse and its dysfunctional implementation. Finally, an educator's *in loco parentis* role creates a particular legal and moral duty of care, in which all educators, without exception, must act as a parent or a guardian would towards learners.

The report seeks to contribute to efforts to address the accountability gap and end impunity for sexual abuse. It also aims to properly understand the human violation behind the phenomenon of educator-learner sexual violence. Education is compulsory in South Africa; learners are required to be in this school space and are lawfully subject to the control of the educator.<sup>16</sup> The obligatory positioning of children under the pupillage and control of an adult educator demands a much higher duty of care and response from the state when that relationship is violated.

In order for this violence to abate, the state response must be without flaw, without hesitation, and without fail.

## **C. Sexual Violence in South Africa**

### ***Prevalence***

A 2008 Centre for the Study of Violence and Reconciliation report described high levels of sexual violence as part of South Africa's wider problem with violence.<sup>17</sup> Statistics show a dramatic rise in reported sexual offences in recent decades.<sup>18</sup> After 1986, the number of recorded rapes increased from around 15,000 in 1986 to 55,114 in the 2004-2005 year.<sup>19</sup> Also striking is the proportion of the male population identifying as perpetrators of sexual violence. In the Eastern Cape and KwaZulu-Natal, 27.6% of men interviewed acknowledged having raped a woman or girl in the past.<sup>20</sup> Of those men, 46.3% said that they had raped more than one woman.<sup>21</sup> In another study on gender violence in Gauteng, 37.4% of the men interviewed admitted that they had, one or more times in their life, committed an act of sexual violence.<sup>22</sup>

It is possible that South Africa has long had high rates of sexual violence but that cases of sexual violence were underreported in the past because of oppression based on race and gender.<sup>23</sup> In contrast, during the democratisation process, the concept that the state's purpose was to "serve *all* South Africans" may have prompted more black women to report sexual violence in recent years.<sup>24</sup> Other factors may have also contributed to the rise in reporting. As legal definitions expanded the scope of what constitutes sexual violence, more people may have been compelled to report forms of violence that were previously "trivialised" by the law.<sup>25</sup> Additionally, the rise of sexual violence awareness may have encouraged more victims to report their cases to the police.<sup>26</sup>

While there are many studies focusing on sexual violence against women, few have explored sexual violence against boys and men. The lack of studies concentrating on men may be due to the fact that "the overwhelming majority of victims of rape are women."<sup>27</sup> Yet, one study of sexual violence in Cape Town found that, of its participants, who had been drawn from a sexually transmitted infection clinic, 40% of the women and 16% of the men were victims of sexual assault.<sup>28</sup> This suggests that while women are the primary victims of sexual violence, a significant number of men are victims of sexual violence as well.

### ***Causes***

Numerous factors have been cited as contributing to the high levels of sexual abuse in South Africa. Some researchers attribute the pervasiveness of violence, in part, to the South Africa's legacy of apartheid.<sup>29</sup> As Naeemah Abrahams explains, "State-sponsored violence and reactive community insurrection" associated with apartheid left violence as a "first line strategy for

resolving conflict and gaining ascendancy.”<sup>30</sup> There is a direct correlation between the “culture of violence” created by apartheid and South Africa’s current sexual assault rates.<sup>31</sup>

Gender inequality in South African society is another contributor to the prevalence of sexual violence.<sup>32</sup> In South Africa, as in other countries throughout the world, patriarchal systems exist in which men hold “most or all of the power and control.”<sup>33</sup> These systems give rise to beliefs that a man has a right to sex in relationships and that a woman has an obligation to comply with a man’s sexual demands.<sup>34</sup> Accordingly, high incidence of sexual violence suggests that “male control of women and notions of male sexual entitlement feature strongly in the dominant social constructions of masculinity in South Africa.”<sup>35</sup>

The breakdown of these structures in modern times may be another cause of sexual violence.<sup>36</sup> Following the rise of democracy in South Africa, women’s empowerment movements and non-discrimination policies have challenged patriarchal systems.<sup>37</sup> Men may view sexual violence as a method of “reasserting masculinity” and controlling women.<sup>38</sup>

Economics also plays a key role in the existence of sexual violence in South Africa. One study has suggested that wealthier men are more likely to rape women because of an “exaggerated sense of sexual entitlement.”<sup>39</sup> In schools, abusive educators prey on poorer learners, giving the learners money in exchange for “sexual access.”<sup>40</sup> Educators have also bribed learners to prevent them from testifying.<sup>41</sup> In some situations, parents may encourage their children to enter into relationships with educators because of the prestige associated with being a teacher,<sup>42</sup> particularly in more rural areas,<sup>43</sup> and the consequent economic support the educators can provide.<sup>44</sup> Sometimes, educators impregnate learners and pay their families to remain silent.<sup>45</sup> In other situations, learners begin relationships with educators for money or good grades.<sup>46</sup>

### ***Impact***

Sexual violence has a lasting impact on victims. For instance, victims of sexual violence may experience negative changes in their psychological health. Human Rights Watch found that learners who experienced sexual violence in schools often had “negative and confused” feelings about themselves and experienced depression, guilt, anger, and anxiety.<sup>47</sup> Sexual violence can also affect the physical health of victims through unwanted pregnancies and the contraction of sexually transmitted infections.<sup>48</sup>

A victim’s performance and attendance in school may also be affected by sexual violence. The CJCP study found that 17.4% of school violence victims missed school and 13% of victims reported lower grades as a result of their experiences with violence.<sup>49</sup> Those who become pregnant may even drop out of school. The 2012 General Household Survey noted that 7.8% of girls between the ages of 7 and 18 who were not attending school cited pregnancy as the cause.<sup>50</sup>

## II. Methodology

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This study is based on desk research and interviews conducted with a wide range of stakeholders from August through November 2013, in Gauteng Province, South Africa.

Other provinces currently have higher rates of sexual violence in schools than Gauteng. In 2013, the CJCP released a report on school violence in South Africa.<sup>51</sup> The study collected data from secondary schools in every South African province.<sup>52</sup> 5939 learners, 239 educators, and 121 principals were interviewed for the study.<sup>53</sup> 11.2% of learners in the Northern Cape and 9.2% of learners in both the Free State and the Western Cape reported having experienced sexual assault.<sup>54</sup> Only 0.7% of learners in Gauteng reported having experienced sexual assault.<sup>55</sup> However, the fact that sexual violence still exists in Gauteng schools suggests that, even in a province where steps have been taken to confront the problem, gaps in the system nevertheless remain. Therefore, Gauteng provides a snapshot of not only the problem, but also the structures contributing to sexual violence in schools.

In addition to this, the researchers chose to focus their research in Gauteng because the Centre for Applied Legal Studies (CALS), a co-author of this report, is based at the University of the Witwatersrand in Johannesburg, which is located in Gauteng. CALS has a rich history of engagement with various communities in the province and as a result, has built important relationships with stakeholders in the area. The presence of these relationships and its location also allows CALS to provide follow-up services to the communities.

From February to June 2013, the Cornell Law School researchers conducted desk research on the international, national, school, and community, and criminal justice responses to school-based sexual violence. The researchers examined various sources related to sexual violence in schools, such as government guidelines, laws, scholarly articles, NGO reports, and training manuals. During this time, the CALS team built relationships with stakeholders in various communities and deepened its engagement with other civil society actors working to address school-based sexual violence.

The Cornell and CALS researchers obtained approval for the project from the ethics boards of their respective academic institutions. CALS also sought and was granted permission from the Gauteng Department of Education and the South African Council for Educators (SACE) to conduct interviews with educators and school management personnel and bodies. To prevent the possibility of re-traumatisation and in light of a lack of guaranteed follow-up psycho-social services, learners were not interviewed.

From 12 to 24 August 2013, the Cornell Law School and CALS researchers conducted more than 30 interviews in Tshwane and Johannesburg with experts, police, government officials, union members, educators, victim support providers, and community members. CALS conducted an additional 14 interviews through November 2013. Before each interview, the researchers obtained informed consent, describing the study and notifying the participants that participation was voluntary. They told participants that no information that could be used to identify them would be recorded or included in the report unless the participant agreed to it. The researchers did not record the names or identifying information of any of the educators they interviewed. They also informed each educator of their legal obligation to report him or her if the educator were to reveal his or her involvement in the sexual abuse of a child. The researchers obtained the participants' consent either orally or in writing. The Cornell and CALS teams used sets of general questions for educators, police officers, government officials, and civil society members, varying the questions for each interview.

The researchers interviewed community members in the Hillbrow neighbourhood of Johannesburg, and the Daveyton and Benoni neighbourhoods of the East Rand. In each community, the researchers worked with a community-based organisation, which facilitated access to community members for purposes of conducting interviews. In Hillbrow, researchers were paired up with Hillbrow community members recruited by the Lutheran Community Outreach Foundation. Each group covered a different part of the neighbourhood, with the researchers interviewing community members and persons at police stations, courts, and clinics.

In the East Rand, researchers worked together with community workers from the Treatment Action Campaign (TAC), who accompanied the researchers as they conducted interviews with various stakeholders. Researchers conducted interviews in a total of six schools, four in Daveyton and two in Hillbrow. Four of the schools were high schools, and two schools were primary schools. Following the interviews, the CALS research team offered follow-up educational workshops around sexual violence in schools to the community-based organisations with which they had partnered, as well as to Labour Relations Officers employed by the Gauteng Department of Education.

### III. Law and Legal Obligations

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#### A. International Law

South Africa has ratified a number of international human rights treaties that obligate it to prevent and respond to sexual violence by educators against learners, including the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), the Convention of the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Under the ICCPR and the CAT, South Africa has a duty to protect learners from torture and cruel, inhuman, and degrading treatment<sup>56</sup> and from violations of their right to security of person.<sup>57</sup> This includes the responsibility to protect learners from sexual violence.<sup>58</sup> South Africa also has a duty to ensure that learners who experience sexual violence at school have access to an effective remedy.<sup>59</sup> Moreover, as a State Party to CEDAW, South Africa is obligated to “pursue . . . without delay a policy of eliminating discrimination against women.”<sup>60</sup> Sexual violence, like other types of gender-based violence, is “a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.”<sup>61</sup>

South Africa also has a duty under the CRC to protect children from sexual violence.<sup>62</sup> This means that it must “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence . . . , including sexual abuse while in the care of parents, legal guardians, or any other person who has the care of the child.”<sup>63</sup> This includes the duty to take measures to protect learners from sexual violence while they are in the care of educators.<sup>64</sup> South Africa also has an obligation to prevent and respond to the sexual abuse of learners because of the devastating impact such abuse has on learners’ rights to education and health, which are guaranteed by the CRC, among other treaties.<sup>65</sup>

As a State Party to these human rights treaties, South Africa has a responsibility to ensure that its teachers do not engage in sexual violence against learners. It must also act with due diligence to prevent, protect against, investigate, punish, and provide redress for this violence.<sup>66</sup> This includes holding accountable educators who sexually abuse learners as well as school administrators, police officers, government officials, or others who fail to prevent or respond to such abuse.<sup>67</sup> It also means developing effective systems that address the causes and consequences of sexual violence against learners and ensuring that learners who experience sexual violence are afforded effective remedies.<sup>68</sup>



## B. Regional Law

Sexual abuse of learners by educators also violates South Africa's obligations under regional human rights treaties, including the African Charter on Human and Peoples' Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Like the ICCPR, the ACHPR prohibits cruel, inhuman or degrading punishment<sup>69</sup> and protects the right to security of person.<sup>70</sup> It guarantees that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as . . . sex."<sup>71</sup> The ACHPR also protects the rights to health and education.<sup>72</sup> It further stipulates that state parties must not only recognise the rights in the Charter but also "undertake to adopt legislative or other measures to give effect to them."<sup>73</sup>

The ACRWC expressly requires states parties like South Africa to protect children from "all forms of sexual exploitation and sexual abuse" and prevent "the inducement, coercion or encouragement of a child to engage in any sexual activity."<sup>74</sup> This includes the duty to "take specific legislative, administrative, social and educational measures" to protect children from sexual abuse.<sup>75</sup>

Similarly, as a State Party to the Maputo Protocol, South Africa has a responsibility to "protect women, especially the girl-child[,] from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices."<sup>76</sup> As part of this obligation, it must "adopt and implement appropriate measures" to protect women and girls from sexual violence and provide "appropriate remedies" for victims of abuse.<sup>77</sup> These regional human rights agreements therefore cement South Africa's obligation to take affirmative and meaningful action to prevent and respond to sexual abuse of learners by the individuals charged with their education and care.

## C. South African Law

South Africa has a strong domestic legal framework that establishes the responsibility of the State to protect learners from sexual violence by educators. This section reviews some of the most relevant legislative provisions.

### *The Constitution*

Under the Constitution of South Africa, the government has an obligation to protect women and girls from public and private violence. Specifically, section 7 of the Constitution places a duty on the state to "respect, promote, and fulfil the rights in the Bill of Rights."<sup>78</sup> Section 12 grants



individuals “the right to be free from all forms of violence from either public or private sources,”<sup>79</sup> which encompasses the right of learners to be free from sexual assault by educators. Section 28 provides that children have a right “to be protected from maltreatment, neglect, abuse or degradation”<sup>80</sup> and to “appropriate alternative care” when removed from the environment of their family.<sup>81</sup> Together, these sections require teachers, administrators and schools to protect children from abuse while they are at school. They also obligate other government institutions and actors, including the legislature, the judiciary, and law enforcement, to prevent, investigate, prosecute, and provide redress for sexual violence against learners.<sup>82</sup>

### ***Criminal Law (Sexual Offences and Related Matters) Amendment Act***

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act) aims “to introduce measures which seek to enable the relevant organs of the state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.”<sup>83</sup> Substantively, the Act amended the definition of crimes such as rape and codified them into statutory law.<sup>84</sup> The Act also expanded the definition of rape by making it applicable to all forms of sexual penetration without consent, irrespective of the gender of the perpetrator or of the victim.<sup>85</sup> Under the amended Act, children under the age of 12 are legally presumed incapable of giving consent, meaning that any sexual act with a child under 12 constitutes rape or sexual assault.<sup>86</sup> The Act also makes it a statutory offence to engage in consensual sex with any individual under the age of 16.<sup>87</sup> This provision can be used to prosecute educators who engage in ostensibly “consensual” sex with learners. Additionally, where an educator compels a learner to engage non-penetrative sexual behaviour, the Act holds them accountable for crimes of “sexual exploitation” or “sexual grooming.”<sup>88</sup>

Chapter 6 of the Act creates a National Register for Sex Offenders (NRSO), listing persons convicted of sexual offenses against children and mentally disabled persons.<sup>89</sup> A person who has been convicted of a sexual offense against a child is prohibited from working with children under any circumstances.<sup>90</sup> That person also must not hold positions in which he or she may have “authority, supervision or care of a child” or may “gain access to a child or places where children are present or congregate.”<sup>91</sup>

Section 62(1) of the Act provides that “[t]he Minister must, after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions, adopt a national policy framework, relating to all matters dealt with in this Act, to: (a) ensure a uniform and coordinated approach by all Government departments and institutions in dealing with matters relating to sexual offences; [and] (b) guide the implementation, enforcement and administration of this Act.”<sup>92</sup> Section 66 directs the Commissioner of the Police to issue national police instructions and the Director of Public Prosecutions to issue directives that regulate how police and prosecutors, respectively,

handle sexual offense cases.<sup>93</sup> Thus, the Act mandates that all relevant government institutions and officials develop and implement an integrated, holistic approach to preventing and responding to sexual violence against learners.

### ***Protection from Harassment Act***

The Protection from Harassment Act provides for the issuance of orders of protection against harassment. A learner may obtain a protection order against an educator if the educator sexually harassed her in a way that causes or inspires a reasonable belief of causing mental, psychological, physical, or economic harm.<sup>94</sup>

### ***Domestic Violence Act***

The Domestic Violence Act establishes procedures under which victims of domestic violence may seek and obtain an order of protection from the court.<sup>95</sup> In 2012, Section 27 and Lawyers Against Abuse, human rights organisations that were representing a learner who was sexually abused by an educator, successfully argued before a Gauteng Magistrate's Court that "[a] teacher assumes parental responsibility for learners at the school at which he teaches," thereby creating a domestic relationship under the Act.<sup>96</sup> The magistrate presiding over that case thus held that, pursuant to the Domestic Violence Act, the learner was entitled to an order of protection against the educator who had abused her.<sup>97</sup>

### ***South African Schools Act***

The South African Schools Act requires public schools to "admit learners and serve their educational requirements without unfairly discriminating in any way."<sup>98</sup> This includes the obligation to prevent and respond to sexual violence by (mostly male) educators against (mostly female) learners, which discriminates against these learners in the exercise of their right to a quality education.

### ***Employment of Educators Act***

Under the Employment of Educators Act, educators may be discharged "on account of misconduct."<sup>99</sup> The Act divides misconduct into two categories: misconduct and serious misconduct.<sup>100</sup> Misconduct includes acts such as conducting oneself "in an improper, disgraceful or unacceptable manner,"<sup>101</sup> assaulting another person,<sup>102</sup> and intimidating other employees and learners.<sup>103</sup> Acts of serious misconduct include "committing an act of sexual assault on a learner, student or other employee,"<sup>104</sup> "having a sexual relationship with a learner of the school where he or she is employed,"<sup>105</sup> and "causing a learner or a student to perform any of [these] acts."<sup>106</sup>

Schedule 2 of the Act describes disciplinary procedures and sanctions for acts of misconduct.<sup>107</sup> Disciplinary hearings must take place within ten working days after the educator receives notice of the hearing and are led by a presiding officer "appointed by the employer."<sup>108</sup> Dismissal is

mandatory if an educator is found guilty of an act of serious misconduct.<sup>109</sup> For actions that do not amount to “serious misconduct,” sanctions may include a verbal or written warning, mandatory counselling, a fine, demotion, suspension without pay, or dismissal.<sup>110</sup> Where the sanction involves a fine, demotion, suspension, or dismissal, the educator may appeal to the Minister of Education or Member of the Executive Council.<sup>111</sup> Any sanction must be suspended during an appeal.<sup>112</sup>

### ***South African Council for Educators Act and SACE Code of Professional Ethics***

The South African Council for Educators Act lays out the powers, duties, and composition of SACE, as well as the regulations concerning the registration of educators.<sup>113</sup> The Act stipulates that a person “must register with the council prior to being appointed as an educator.”<sup>114</sup> The Act states that an educator may be removed from the register if he or she was “found guilty of a breach of the code of professional ethics.”<sup>115</sup>

The SACE Code of Professional Ethics outlines the conduct that is expected between educators and learners.<sup>116</sup> Educators must respect the rights of learners<sup>117</sup> and refrain from “any form of abuse,”<sup>118</sup> “improper physical contact with learners,”<sup>119</sup> “sexual harassment (physical or otherwise) of learners,”<sup>120</sup> and “any form of sexual relationship with learners at any school.”<sup>121</sup> The Code also defines the functions of the SACE disciplinary committee.<sup>122</sup> The committee is charged with establishing panels to investigate breaches of the code, conducting disciplinary hearings, ensuring that breaches are investigated, and recommending sanctions.<sup>123</sup> The Code goes on to describe in detail the processes for the investigation of breaches of the code, the disciplinary hearing, the recommendations of the disciplinary panel and committee, the decisions of the council, and the appeals process.<sup>124</sup>

### ***South Africa Labour Relations Act***

The former Education Labour Relations Act of 1993 established the Education Labour Relations Council (ELRC).<sup>125</sup> The South Africa Labour Relations Act of 1995, which repealed the earlier Act,<sup>126</sup> provided for the continued existence of the ELRC and now confers the legislative authority for its operations.<sup>127</sup> An educator or a teacher’s union that is representing an educator may refer an educator’s dismissal to the ELRC for dispute resolution instead of an internal appeal or where the appeal is not concluded within 45 days.<sup>128</sup>

### ***Children’s Act***

The Children’s Act established the National Child Protection Register (NCPR).<sup>129</sup> Part A of the register includes a “record of abuse or deliberate neglect inflicted on specific children.”<sup>130</sup> Part B designates individuals who are “unsuitable to work with children.”<sup>131</sup> A person is considered to be “unsuitable to work with children” if he or she is convicted of, among other offenses, indecent assault, rape, or “assault with the intent to do grievous bodily harm with regard to a child.”<sup>132</sup> If a

person's name is listed in Part B of the Register, he or she is prohibited from managing, volunteering, or working at any institutions that serve children, including schools.<sup>133</sup>

### ***Service Charter for Victims of Crime in South Africa***

The Service Charter for Victims of Crime in South Africa (Victims' Charter) outlines the rights of victims of crime.<sup>134</sup> Seven rights are framed in the Charter: "the right to be treated with fairness and with respect for dignity and privacy," "the right to offer information," "the right to receive information," "the right to protection," "the right to assistance," "the right to compensation," and "the right to restitution."<sup>135</sup>

As a part of the right to be treated with fairness, the victim must be interviewed about the crime in private and treated with respect by service partners.<sup>136</sup> Under the right to offer information, the victim is empowered to participate in the criminal justice process should he or she choose to do so, and the police and prosecutor must ensure that the information victims provide is considered in the process.<sup>137</sup> The victim's right to receive information includes the right to be informed of his or her rights and role in the case.<sup>138</sup> The right to protection guards the victim from harassment and abuse.<sup>139</sup> In realising the right to assistance, the government must ensure that the victim has access to relevant social, health, and counselling services, as well as legal assistance.<sup>140</sup>

### ***Gauteng School Education Act***

The Gauteng School Education Act seeks to "provide for the provision and control of education in schools, and matters connected therewith."<sup>141</sup> The Act places a duty on the Gauteng Education Department to "protect learners and educators from all forms of physical and mental violence at schools and centres of learning."<sup>142</sup> The Department also has a duty to "combat sexual harassment at schools and centres of learning."<sup>143</sup>

### ***Caselaw***

South African courts have held government officials responsible for failing to respond to reports of sexual violence and in civil actions have ordered them to pay damages to the victims of such violence.<sup>144</sup> Although they have not been tested in the courts, civil suits against school officials who fail to prevent or respond to school-based violence may be a promising option for addressing gaps in accountability. At least one court has recognised the duties of the school to protect learners and to respond to sexual violence cases.<sup>145</sup> In *S v. Zothile*, a school gardener was convicted of raping a 9-year-old learner.<sup>146</sup> The High Court expressed concern that the school principal had failed to respond to assist and protect the learner<sup>147</sup> and that the school did not have programs in place to deal with sexual abuse cases.<sup>148</sup> It noted that these facts "suggest[ed] a serious dereliction of duty on the part of the Principal and her school."<sup>149</sup> Despite this reasoning, the court did not impose any sanction against the school.

## IV. Accountability in the Education System

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The education system suffers from poor implementation of a relatively progressive legal and policy framework for addressing sexual violence in schools, particularly where educators are perpetrators. Various factors contribute to this conundrum, ranging from a conceptual confusion about what constitutes sexual abuse, to a lack of political will to hold educators accountable, to imperfect information sharing systems between different stakeholders, to multiple and duplicative disciplinary processes, to inadequate sanctions. As a result, many educators who sexually abuse learners are not held accountable for their actions. This creates a culture of impunity and allows the problem of school-based sexual violence to persist. The section below will assess how the education system has responded to this grave human rights violation through policies and procedures, and the chief challenges in their implementation.

### A. Policies and Programmes

The 1996 South African Schools Act outlines basic safety requirements for public schools. The Department of Basic Education (DBE) is responsible for implementing these requirements within the public school system. Although implementation remains incomplete, the South African government has made important efforts to provide guidance for schools on preventing and responding to sexual violence. In line with these efforts, the DBE published several sets of guidelines and memoranda to address sexual violence in schools.<sup>150</sup>

#### *Policies*

In 2001, the Department of Education, the DBE's predecessor,<sup>151</sup> published *Opening Our Eyes: Gender-Based Violence in South African Schools*, which has been used to train educators and administrators on how to manage sexual violence in schools.<sup>152</sup> The Department also addressed the issue of sexual violence in schools in *The HIV/AIDS Emergency: Department of Education Guidelines for Educators*, which was published in 2002. In the Minister of Education's introduction, the Minister notes that "[m]ale educators have a special responsibility" and must stop "demanding sex with schoolgirls or female educators."<sup>153</sup> Sex with learners violates the law and is a "disciplinary offense" that "betrays the trust of the community."<sup>154</sup>

In 2008, the Department of Education published *Guidelines for the Protection and Management of Sexual Violence and Harassment in Public Schools* (Guidelines).<sup>155</sup> The Guidelines standardise procedures that are meant to assist schools in developing their own comprehensive response programs.<sup>156</sup> They emphasise the Department's major prevention activities: training sessions, school codes of conduct, and educational materials.<sup>157</sup> They also include step-by-step procedures for administrators and educators to follow when a student reports an instance of sexual violence.<sup>158</sup> Schools, however, are not legally required to adopt and implement the

Guidelines. The Guidelines also potentially conflict with legislation and other policies.<sup>159</sup> For example, the use of the umbrella concept “sexual harassment” throughout the Guidelines conflicts with the understanding and definition of sexual harassment in other contexts, including employment, and ultimately prevents meaningful accountability of educator perpetrators.<sup>160</sup>

In 2008 and 2009, the DBE released *Generations*, a series of materials aimed at helping educators understand the Guidelines.<sup>161</sup> The DBE provided training for educators in 2009, and the provincial departments of education continue to train educators using these Guidelines.<sup>162</sup> In addition to its guidelines for educators, the DBE has also developed guidelines for students. The DBE plans to create additional guidelines to assist those who wish to report persons “unsuitable to work with children.”<sup>163</sup>

Published by the DBE in 2010, *Speak Out* (a handbook) is focused on educating learners about how to deal with cases of sexual abuse.<sup>164</sup> It uses colourful graphics to capture a learner’s attention and highlights important aspects of the problem of sexual violence in schools. The handbook covers much of what is addressed in the Guidelines, including the various levels of offenses and procedures to be taken in each case.<sup>165</sup> The handbook emphasises that educators are legally mandated to report sexual abuse.<sup>166</sup> It also provides SACE’s contact information so learners can directly report sexual abuse themselves.<sup>167</sup> The handbook describes the process of police reporting and investigation in basic terms, briefly outlining a victim’s rights at the police station and what will happen should a case go to court.<sup>168</sup> It also provides checklists and contacts that may be useful to learners when reporting abuse.<sup>169</sup>

### ***Programmes***

In addition to promulgating policies, the DBE has initiated programmes that specifically address sexual violence and harassment in schools. Some of these programmes include a focus on the factors that contribute to school-based sexual violence, such as general violence, gender inequality, and lack of education about sexual violence.

The DBE has developed a number of programmes focused on school safety from a gender perspective. In 1996, the Adopt-a-Cop programme was initiated in order to reduce violence in schools.<sup>170</sup> Every participating school is assigned a volunteer police officer to collaborate with the school on any matter within police expertise.<sup>171</sup> The DBE launched the Tirisano Plan in 2000 as a response to the Minister of Education’s call to provide effective education to all South Africans.<sup>172</sup> The Tirisano Plan includes measures to staff schools with administrators who are committed to fostering a school culture that promotes gender equality and enforces school safety.<sup>173</sup> In 2008, the Department of Education, together with the Centre for Justice and Crime Prevention, developed the Hlayiseka (“to be safe”) Project to assist schools in dealing with crime and violence proactively.<sup>174</sup> The project advocates a “whole school approach” to school safety

and developed an early warning toolkit.<sup>175</sup> The government has implemented the project in in all nine provinces, including Gauteng Province.<sup>176</sup> In 2011, an independent civil society initiative developed the Safer Schools Guide to a School Emergency Management Plan as a template for creating a comprehensive response to emergency situations and as a framework for addressing a range of other issues, such as violence prevention, which require a coordinated school response.<sup>177</sup> The guide applies an emergency management plan to addressing incidents of sexual abuse and rape within a school.<sup>178</sup>

In 2011, the DBE and South African Police Service (SAPS) developed a protocol on the “prevention of crime and violence in all schools” to promote safer schools.<sup>179</sup> This protocol works through the SAPS Crime Prevention Component (Division: Visible Policing) and the DBE’s Directorate: School Safety and Enrichment Programmes (Branch: Social Mobilisation and Support Services).<sup>180</sup> In its second phase, his programme has linked more than 18,000 schools with police stations and established an equal number of safe school committees.<sup>181</sup>

The DBE and provincial departments of education have also established programmes that incorporate gender-based violence and sexual abuse education into the school curriculum. UNICEF joined hands with the national and provincial departments of education to introduce the Girls and Boys Education Movement (GEM) in South African schools in 2002.<sup>182</sup> GEM’s objective is to ensure that children’s voices are prioritised in the field of education, with a particular focus on protecting the rights of girls “and any child at risk of exploitation or abuse in or outside school.”<sup>183</sup> It pursues this objective by “sensitis[ing] key actors in the importance of girls’ education and mobilis[ing] policies and programs that will ensure quality education for all girls.”<sup>184</sup> Unfortunately, limited funding and dissemination of the programme, as well as obstacles to changing the mind-set of school communities, have compromised the effectiveness of the GEM movement.<sup>185</sup>

In 2012, the Department of Education and Proudly South African<sup>186</sup> initiated the Ubuntu campaign, which seeks to address sexual violence and bullying in schools. The Ubuntu campaign is directly aimed at addressing sexual violence in schools through educational presentations and provision of materials on sexual violence. It also asks students to take the Ubuntu Pledge, which “speaks to moral decency, making the right choices, honourable conduct, and living as a proud South African.”<sup>187</sup> In February of 2013, in the wake of several rapes that were widely publicised,<sup>188</sup> the DBE and Lead SA<sup>189</sup> developed the StopRape campaign in order to raise awareness about sexual assault in South African schools.<sup>190</sup> The campaign also asked students to take an anti-rape pledge in school.<sup>191</sup>



## **B. Accountability through Administrative Disciplinary Procedures**

As discussed above, educators in South Africa are regulated by national legislation, specifically the South African Schools Act, the Employment of Educators Act, the South African Council for Educators Act, and the Labour Relations Act, as well as provincial legislation promulgated by provincial education departments. This suite of legislation unequivocally establishes that educators are prohibited from sexually assaulting learners or having sexual relationships with them. It also establishes appropriate disciplinary procedures to handle violations of the law. The Gauteng Department of Education has adopted a Zero Tolerance policy for all sexual offences in schools, intent on rigorously advocating for appropriate sanctions and accountability.<sup>192</sup>

Where educators are found to have engaged in sexual abuse, it is the entities established by these laws that sanction them, namely the Labour Relations Unit of the DBE (working through its district and regional offices), the South African Council for Educators, and the Education Labour Relations Council.<sup>193</sup> At the school level, reports of sexual abuse should be directed to the School Management Team (SMT), School-based Support Team (SBST), and the School Governing Body (SGB).<sup>194</sup>

Learner victims of educator-perpetrated sexual abuse encounter these multiple entities when they report a particular incident and then participate as a witness in the investigation and disciplinary hearings that follow. Below, we discuss the multiple challenges encountered at every point along the way.

### ***Educational Resources and Training***

The DBE has made remarkable efforts to develop written resources that promote rights awareness amongst learners and encourage the establishment of gender empowerment organisations in schools. However, the Department has largely rolled out this strategy in isolation, without laying supporting infrastructure –i.e., training educators in gender-based violence law and procedure and in how to effectively teach the material as part of the school curriculum, making these materials widely accessible, and making compulsory the adoption and implementation by schools of these policies.<sup>195</sup> This has substantially limited the potential value of these important efforts.

While the Guidelines and *Speak Out* are generally useful tools that can help schools prevent and respond to gender-based violence, the DBE has not made them available to all learners. In 2012, the DBE stated that “the number of public ordinary schools that have access to materials and information regarding the managing and prevention of sexual violence stand[s] at 2,928.”<sup>196</sup> This is only a small proportion of South Africa’s approximately 24,300 public schools.<sup>197</sup> Moreover, not all learners receive workshops in these materials.<sup>198</sup>



Effective educator training on reporting mechanisms largely remains an unfulfilled promise. The Gauteng Department of Education, in its five-year strategic plan for 2009/10 to 2014/15, committed only to disseminate and make learners and educators aware of “[a] guideline on sexual harassment and violence.”<sup>199</sup> It did not commit to training educators. One GDE official stated that the manuals given to educators and principals contain too much information to be effective without also providing training in how to operationalise the manual.<sup>200</sup> The same official has been involved in training principals and reports that there has been an increase in the rate of reporting from schools where training has taken place.<sup>201</sup> Unions should also provide educational programmes that are accessible. Although the National Professional Teachers’ Organisation of South Africa (NAPTOSA), a teachers’ union, provides workshops to its members on sexual abuse,<sup>202</sup> an educator who is a member of NAPTOSA stated that she has been unable to access these courses because of the high fee charged.<sup>203</sup>

Labour relations officers employed by the provincial departments of education and investigative officers employed by SACE, who are charged both with investigating incidents of sexual abuse and conducting and presiding over hearings, also need proper training to ensure they are well-versed in the relevant legislation and procedures. These individuals are also often responsible for training principals and educators in reporting mechanisms. Many labour relations officers were previously assigned to other units and do not understand the dynamics surrounding sexual abuse.<sup>204</sup> Moreover, there is a high rate of turnover amongst labour relations officers, which means that frequent and intensive training is critical.<sup>205</sup> For example, several officials indicated that the difference between a good charge sheet, which describes the allegation with “clear particularity,” and a bad charge sheet, which does not, is the training that the official making the charge received.<sup>206</sup> Similarly, many labour relations officers within the DBE are not aware of what is required to prove a rape case.<sup>207</sup> In order for investigative and presiding officers to be able to conduct effective investigations and disciplinary proceedings and to train principals and educators in reporting mechanisms, their training needs to be prioritised.<sup>208</sup>

### ***Culture of Silence***

A fundamental obstacle to accountability is the culture of silence that pervades the school community. This culture of silence is informed by a number of societal challenges. As one GDE official stated, “Schools are a reflection of what society is. It is not merely about schools being dysfunctional; it is about society being dysfunctional. We must address the issues in society in order to address the issues in school.”<sup>209</sup> Where sexual violence is not taken seriously in the community and parents are not prepared to take a stand against the sexual abuse of their children, there is little hope that there will be educator accountability for school-based sexual violence.<sup>210</sup>

As stated earlier, poverty plays a significant role.<sup>211</sup> Learners are reluctant to disclose abuse inflicted on them by educators for fear of losing the material benefits afforded to them by the

educator. Parents also refuse to allow learners to testify because of economic promises made to learners and sometimes their families.<sup>212</sup>

Another factor is the “untouchability” of educators in many schools. This is particularly true given the history of democratic change in South Africa, which emanated from schools.<sup>213</sup> Educators are often accorded high prestige, particularly those teaching in rural schools or those whose learners achieved high matric pass rates in subjects like maths and sciences, and there is often a reluctance to bring an educator to account.<sup>214</sup> In one high school, three educators have been implicated in sexual abuse against learners, but the principal has not taken action, it is assumed, because the accused teachers produce great matric results and are powerful within the school community.<sup>215</sup> Often, educators will not report allegations of sexual abuse committed by their colleagues due to the “micro politics” that go on in schools.<sup>216</sup> Several educators interviewed stated that they were less likely to admit knowledge of abuse while speaking in the company of other educators or school management.<sup>217</sup> One frustrated high school educator stated that she knows about many allegations of educator-learner sexual abuse but has not reported the suspected educators because she has become disfavoured within her school for “speaking out” and fears for her life and her job.<sup>218</sup>

Lack of communication about sexual violence in school may also be linked with the stringent provisions of the Sexual Offences Act, section 54(1), which makes it a crime for an educator to fail to report a sexual offense against a child if that educator knows about it.<sup>219</sup> Under Section 1 of the Children’s Act, an educator “knows” of a sexual offense against a child if the educator *reasonably believes* that the child has been sexually abused.<sup>220</sup> He or she is then obligated to report the offense to a “designated protection organisation, the provincial Department of Social Development or a police official.”<sup>221</sup> Although these provisions seem to provide important support to learner victims of sexual abuse, they might in fact contribute to the relative lack of discussion among educators. Educators may remain silent because they fear incurring liability, do not wish to implicate a colleague in a criminal offence, or are concerned about negative repercussions from school officials.

A 2011 SACE report showed that when incidents of violence were reported to school administrators, those administrators often chose not to relay the reports to the authorities because the school’s or their own reputations could suffer.<sup>222</sup> The CJCP report found that educators or administrators took action in only 61.9% instances of sexual assault.<sup>223</sup> Consequently, nearly one-fifth (19%) of sexual assault victims did not report the incident at all because they did not think it would help to do so.<sup>224</sup> The relatively low rate of action taken by educators is troubling considering 95.9% surveyed in the CJCP report admitted they were aware of what measures should be taken if “thefts, robberies [or] assaults” occur at school.<sup>225</sup>

## ***Reporting Mechanisms***

In terms of reporting sexual offences allegedly perpetrated by educators, the Guidelines refer to the Employment of Educators Act and the SACE Act.<sup>226</sup> Each school “should have a well-established” School-based Support Team whose members include individuals from the School Management Team, representatives from the council of learners and school governing body, and educators. Additionally the SBST should include members of the community “and representatives from any of the Departments of Education, Health, Justice and Constitutional Development as well as the National Prosecution Authority, Correctional Services, Safety and Security and Social Development.”<sup>227</sup>

The purpose of the SBST is “to ensure that cases of sexual violence and harassment are reported, dealt with and referred accordingly, within reasonable time frames.”<sup>228</sup> Most members of SBSTs, however, do not receive training and are unequipped to handle the cases they encounter.<sup>229</sup> The SMT is responsible for investigating allegations of sexual violence and harassment and managing disciplinary proceedings. Its investigation “should run concurrently with police investigations” and with investigations by SACE and the Department of Basic Education.<sup>230</sup>

School principals must officially report cases of alleged sexual violence and harassment against learners to the school’s district or regional office.<sup>231</sup> District and regional offices should forward this information to provincial offices, which forward the information to the national office.<sup>232</sup> Where incidents are considered to be minor, the school is required to report the incident to designated officers or administrators at the school who then investigate and issue a report of their findings.<sup>233</sup> The Guidelines only recommend that an incident be reported to the police or other “appropriate authority” if it is of sufficient severity and note that failure to do so is a criminal offense.<sup>234</sup> Moreover, a principal who reports is not required to simultaneously report to both the district office of the DBE and to SACE, which impedes the effectiveness of these disciplinary processes.<sup>235</sup>

Often, schools do not adhere to their reporting obligations because the SMT is not certain about the merits of a case<sup>236</sup> or is ineffective.<sup>237</sup> If educators fail to report incidents of sexual abuse, they could be sanctioned. Indeed, a principal in Tshwane was recently dismissed for failing to report a sexual abuse case.<sup>238</sup> As noted in the previous section, sometimes school officials fear to report cases because of the status of the educators involved or the status of the school.<sup>239</sup> There also appears to be confusion over how viable the allegation must be for a principal’s reporting obligations to be triggered.<sup>240</sup>

A number of individuals interviewed by the research team indicated that there is a lack of awareness among educators and other actors involved in school leadership and governance regarding the proper mechanisms for reporting sexual abuse. Although the DBE and other actors have developed an abundance of educational material on reporting sexual abuse, these materials are often confusing and inconsistent.<sup>241</sup> Interviewees gave conflicting accounts of the procedures that are available for reporting sexual abuse. One primary school educator stated that where an educator is suspected of being a perpetrator, a union representative within the school reports to the principal, who in turn reports to the SGB, who then takes it further.<sup>242</sup> A high school educator described a process in which a junior educator reports to a senior educator, who then may choose whether to report to the principal.<sup>243</sup> Two high school principals stated that they were charged with investigating the allegation first before reporting externally and that “a lack of evidence” would diminish the allegation and put an end to further reporting as one “could not act on rumours.”<sup>244</sup> The CEO of NAPTOSA stated that the school is immediately obligated to take action and report the matter to the police and the provincial department of education.<sup>245</sup> Similar confusion appears to prevent prompt reporting between educational entities. According to a SACE official, SACE often learns about cases of educator-learner abuse from the media, not from the DBE.<sup>246</sup>

### ***Coordination***

One of the greatest impediments to accountability within the education system is the tedious, duplicative, and overlapping disciplinary processes provided for in various laws. These processes often are at odds with the heightened protections for child complainants/witnesses contained in the Children’s Act and Child Justice Act, and often serve to intimidate the complainant from coming forward at all or continuing with the long processes.

In the current system, a complainant potentially has to go through up to four hearings, excluding the internal school investigation.<sup>247</sup> Several officials involved in conducting these hearings expressed concern about the duplicative processes. Indeed, a DBE Labour Relations official is lobbying for a revision of the laws and policies that have created overlapping disciplinary hearings.<sup>248</sup> A SACE official has requested a legal opinion on how to streamline the process.<sup>249</sup> One GDE School Safety official suggested that the Department explore the possibility of video recording the complainant’s testimony so as not to risk the possibility of re-traumatisation and possible withdrawal from disciplinary processes.<sup>250</sup> Another DBE official suggested that a single hearing be conducted at which all of the relevant parties with an interest are present, which would necessitate the learner to testify only once.<sup>251</sup> This omnibus hearing could follow a structure similar to that of a pre-dismissal hearing, which would allow the next step to be review by a labour court and not a string of additional internal administrative appeals or hearings.<sup>252</sup>

Further, the labour relations officers who work for GDE wear different hats – they play the role of investigator in alleged sexual offences cases as well as serve as presiding officers in cases of other districts and provinces. SACE has requested that GDE also allow its labour relations officers to be seconded to preside over SACE disciplinary hearings.<sup>253</sup> The lack of capacity of both the DBE and SACE to handle all disciplinary hearings further underscores the need to streamline the separate hearings into one hearing. Indeed, SACE has submitted a request to DBE for a handover from DBE of all disciplinary proceedings involving educator sexual abuse, while leaving other kinds of educator misconduct cases with the DBE.<sup>254</sup> Given SACE's own lack of resources to investigate these cases, however,<sup>255</sup> it is questionable whether this division of labour would result in more efficient and effective accountability.

Another coordination concern relates to the two registers for sex offenders and for child protection. A lack of coordination between the DOJ, DSD, DBE, and SACE results in severe under-inclusion on both registers.<sup>256</sup> To address this, in mid-2013, the DBE took part in a dialogue with the DOJ&CD, the SAHRC, and representatives from the provincial government.<sup>257</sup> The aim of the dialogue was to strengthen the relationship between the entities present in order to fast track implementation of the NSRO.<sup>258</sup> Participating entities acknowledged the need to ensure constant communication so the NSRO could be regularly populated with the names of offenders.<sup>259</sup> One of the recommendations submitted after the dialogue was to create a system in which SACE and DBE have a responsibility to report any suspicions of sexual abuse to the police.<sup>260</sup> Moreover, the DBE has established a portfolio committee tasked with investigating its obligation to provide DSD with names of educators who have been dismissed for misconduct.<sup>261</sup>

### ***Intimidation during the Disciplinary Process***

Some educators' trade unions have reportedly frustrated disciplinary hearings for accused educators.<sup>262</sup> The higher the accused educator is in the ranks of the union to which he or she belongs, the easier it becomes to impede the DBE's processes through acts such as offering bribes and bullying. In some instances, the union has itself bribed or intimidated the victim or witnesses.<sup>263</sup> Although educators' trade unions have policies condemning sexual abuse perpetrated by educators against learners,<sup>264</sup> there are concerns about the obstructionist position that unions sometimes take in defending educators during disciplinary procedures against allegations of sexual abuse.<sup>265</sup> The role of some trade union representatives has been described as "almost militant."<sup>266</sup>

Educators facing disciplinary processes are entitled to have a representative defending them before the disciplinary body. While lawyers are increasingly involved in cases where educators face dismissal, this individual is most often a union representative.<sup>267</sup> The Constitution of the South African Democratic Teachers' Union (SADTU) indicates that an educator has a right to representation by the union, even where there are charges of sexual abuse.<sup>268</sup> NAPTOSA also

defends members accused of abuse.<sup>269</sup> According to a SACE official, some unions in the Free State choose not to represent a member in the disciplinary process if the member is accused of rape or sexual assault.<sup>270</sup>

A DBE Labour Relations official and a GDE Labour Relations official both suggested that intermediaries need to be made consistently available to learners in disciplinary hearings, particularly if educators bring union representatives or lawyers.<sup>271</sup> These intermediaries would assist victims in dealing with the secondary trauma of testifying in disciplinary hearings, particularly because the investigating officials are not trained in psycho-social interventions.<sup>272</sup>

### ***Ineffective Sanctions***

There is wide concern that educators are not always struck off the educators' register after they are dismissed from employment.<sup>273</sup> SACE believes this happens because complaints are not reported to it at the same time that they come before the DBE. This results in a time lag from the point when DBE dismisses an educator until the SACE process is triggered.<sup>274</sup> If the DBE finds an educator guilty of misconduct, the sanction is dismissal. If SACE finds an educator guilty, the sanction is striking off of the register. Neither entity has the power to override the other's sanction.<sup>275</sup>

Thus if DBE finds an educator guilty of an alleged sexual offence, but SACE finds the same educator not guilty, that educator will be dismissed from employment at the current school but could seek employment elsewhere. In fact, this occurs frequently: educators disappear and “re-appear” in another province or district, seeking employment as an educator.<sup>276</sup> Although the DBE maintains records about the persons it employs and their history of employment, its records are not always accessible by the administrators who are making hiring decisions. The President of the National Association of School Governing Bodies (NASGB) believes that requiring the DBE to consult a SGB before the DBE hires an educator for its school would allow the SGB to conduct its own investigation into the educator's background.<sup>277</sup>

Even where the educator is in fact struck off the register, it still does not safeguard against that educator seeking employment at a private school.<sup>278</sup> There is no oversight mechanism to ensure that the educators hired by these schools have clean record, as the schools do not use the DBE-centralised database. SACE has been trying to encourage private/independent schools to vet candidates for teaching positions, but often principals of those schools follow their own appointment procedures.<sup>279</sup> It is thus critical to coordinate these processes so as impose a thorough set of sanctions on an educator found to have committed a sexual offence against a learner.

A SACE official expressed concern about the lack of finality of disciplinary processes where educators are often able to invoke “yet another appeal.”<sup>280</sup> Indeed, an educator can appeal a DBE finding and a SACE finding within these entities<sup>281</sup> and refer a sanction of dismissal to the Education Labour Relations Council instead of an appeal or in cases where an appeal is not resolved within 45 days.<sup>282</sup> The educator’s employment prospects within the education system may remain undisturbed while these procedures are pending. In discussing SACE’s request to the DBE for a handover to SACE of all disciplinary proceedings involving educator sexual abuse,<sup>283</sup> a SACE official reasoned that its handling of all sexual abuse cases would allow for finality to be achieved because, if an educator is found guilty, there would not be another enquiry. The educator in question would no longer be able to teach.

Further, the statistics that DBE/GDE and SACE have compiled reveal that complaints of sexual misconduct take years to resolve. Though the sanction for a guilty finding is dismissal, in many cases, educators are not found guilty following an investigation. In 2003, SACE reported that between 1999 and 2002, only 32 educators had been dismissed for having sexual relationships with students.<sup>284</sup> In 2012, SACE released a report on disciplinary cases referred to SACE in 2008 and 2009. According to the report, 119 educators in 2008 and 98 educators in 2009 were accused of misconduct (comprising absenteeism, assault, fraud, humiliation, mismanagement of school finances, sexual misconduct, unfair labour practice, or unprofessional conduct). In 2008, 10 of these educators were accused of sexual misconduct; 21 were accused of sexual misconduct in 2009. Additionally, two principals/deputies were accused of sexual misconduct each year.<sup>285</sup> The report suggests that educators faced few serious sanctions for sexual misconduct in 2008. That year, only 12 decisions were reached in cases of sexual misconduct. In only three of the cases were the accused struck off the roll indefinitely. Four cases were referred (one to the SAPS, three to the Provincial Education Department); in the rest of the cases, advisory letters were issued, charges were dropped, or there was a finding of lack of evidence or no jurisdiction.<sup>286</sup> The situation appears to have improved in 2009: 24 decisions were reached in cases of sexual misconduct, and in over half the cases (13) the accused were struck off the roll indefinitely.<sup>287</sup>

The report categorises case decisions according to type of misconduct, but does not provide definitions for any of these categories or identify whether the victim was an educator or learner.<sup>288</sup> However, the SACE’s 2011-2012 Annual Report notes that all sexual offences, including rape and consensual sexual relationships with learners of any age, are included under the blanket term “sexual misconduct.”<sup>289</sup>

The SACE 2011-2012 Annual Report indicates that between 2010 and 2012, there was an increase in sexual misconduct. From 1 April 2010 to 31 March 2011, there were 126 complaints of sexual misconduct, including rape. These included rape allegations, harassment and



inappropriate relationships with learners.”<sup>290</sup> SACE also indicated that perpetrators continue to face light sanctions for misconduct: “Written advisory or cautionary notices to offenders were the most common result in finalised cases.”<sup>291</sup>

In the last financial year of 2012-13, SACE received 556 cases of educator misconduct (including sexual abuse, corporal punishment, and other misconduct cases), but only 54 hearings were held, 27 educators were struck off the register indefinitely, 1 educator was struck off with the possibility of reapplying, and 28 educators were struck off but with the striking off suspended for a certain period of time.<sup>292</sup> 180 cases are still in process.<sup>293</sup> SACE reports that cases are not resolved for many months. In 2008, most cases took over 27 months to conclude.<sup>294</sup> This turnaround time has improved, but as of 2012, “a substantial number of cases still remained unresolved at the time of reporting.”<sup>295</sup>

At the provincial level, some provincial education departments release statistics on disciplinary procedures, but their documentation is incomplete. In its Annual Reports, for example, the Gauteng Department of Education merely states the number of instances of misconduct “for which employees were found guilty.” It is not clear whether guilt was determined in intraschool disciplinary procedures or DBE procedures pursuant to Schedule 2 of the Employment of Educators Act.

In 2010-11, GDE found employees guilty of eight instances of “sexual misconduct,” which is not further defined.<sup>296</sup> In 2011-12, employees were found guilty of “sexual harassment/ assault/ relationship.”<sup>297</sup> GDE does not specify the number of allegations of each type of misconduct. Neither does it specify the victim(s) in each case, so it is impossible to know if educators were accused of sexual misconduct committed against learners or fellow staff. GDE provides the total number of sanctions for the year, but it does not link these sanctions to offences. In 2012-13, there were 18 cases of educator-learner sexual abuse, and in 2013-14 thus far, there have been 4 such cases.<sup>298</sup>

## ***Legislation***

There are inconsistencies within and among legislation, policies, and other codes. For example, there is dissonance between the Employment of Educators Act and the SACE code of ethics for educators.<sup>299</sup> The Employment of Educators Act prohibits educators from “having a sexual relationship with a learner of the school where he or she is employed.”<sup>300</sup> Yet, the SACE Code of Professional Ethics states that educators must refrain from having “any form of sexual relationship with learners *at any school*.”<sup>301</sup> These inconsistencies make implementation difficult, as they may cause confusion among school administrators, educators, and other stakeholders as to what behaviour is prohibited. Another example of inconsistency within the Employment of Educators Act is that section 18, which regulates educator misconduct, states that an educator



“may be dismissed for rape,” but section 17, which regulates serious misconduct, states that an educator “*must* be dismissed for having a sexual relationship with a learner of the school where he or she is employed.”<sup>302</sup> Section 18 is also in conflict with section 41(1)(a) of the Sexual Offences Act, which provides that a person who has convicted of a sexual offence against a child may not “be employed to work with a child in any circumstance.”<sup>303</sup> It further contradicts the Children’s Act, which also provides for harsher sanctions where an educator is found guilty of rape, including having one’s name listed in the register and being denied access to children at a school.<sup>304</sup>

Finally, many educators are accused of manipulating loopholes in the processes established through legislation. For example, DBE and SACE officials reported that some educators resign as soon as they are served with a charge sheet.<sup>305</sup> Per Schedule 2 of the Employment of Educators Act, up to ten working days can pass before a disciplinary hearing occurs, and within this period, educators charged with sexual abuse often resign.<sup>306</sup> When educators do this, they are still entitled to employment benefits, which would not be the case if they were dismissed as a result of a disciplinary hearing.<sup>307</sup>

One commentator has recommended that Parliament harmonise the provisions of the Employment of Educators Act, particularly section 17, which deals with sexual assault and sexual relationships with learners, with the provisions of the Sexual Offences Amendment Act and the Children’s Act.<sup>308</sup> Sexual misconduct should unequivocally be classified as serious misconduct, and it should be clearly defined, with clear sanctions.<sup>309</sup> As the commentator notes, such corrective measures may help “eliminate the view that sexual misconduct will affect only the educator’s employment situation and emphasise the fact that the various forms of sexual misconduct constitute criminal offences.”<sup>310</sup> During the process of legislative reform, SGBs should be extensively consulted, as an entity that is well situated to demand accountability of its educators. The president of the NASGB has suggested that SGBs be given an enhanced role to play in promulgating a code of conduct for educators.<sup>311</sup>

Despite the elaborate infrastructure in place within the education system to raise awareness about sexual violence in schools and to handle complaints and institute disciplinary processes, educator accountability for perpetrating sexual violence against learners remains an elusive goal.

## V. Accountability in the Criminal Justice System

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Just as the education system has struggled to hold educators and school administrators accountable for educator-perpetrated sexual abuse of learners, the South Africa's criminal justice system has revealed similar gaps in accountability. Challenges such as inadequate training, biased attitudes towards victims of sexual abuse, insufficient resources to ensure effective investigations and prosecutions, and a lack of collaboration among criminal justice officials have prevented the system from effectively responding to sexual violence in schools.<sup>312</sup> This section examines the gaps in accountability that exist within the criminal justice system and specifically within the South African Police Service, the National Prosecuting Authority, and the Judiciary.

### A. South African Police Service and Family Child Protection Unit

As a government institution, the South African Police Service has a duty to investigate reports of sexual violence in schools. To fulfil this duty, SAPS created the specialised Family Violence Child Protection and Sexual Offences (FSC) Units in 1995 in an effort to reduce sexually-related crimes.<sup>313</sup> However, a lack of consistency in leadership, training, and resources stalled the success and growth of these units and of SAPS' ability to investigate reports of sexual violence. For example, in 2006, the former National Commissioner of Police disbanded the victim-friendly FCS offices and integrated their officers into individual police stations. This led to a decline in services for victims of sexual abuse and may have led to fewer convictions.<sup>314</sup>

Fortunately, however, the FCS Units were reinstated and became fully operational again by 2011.<sup>315</sup> According to one study, rape cases handled by FCS officers are significantly more likely than cases handled by regular police officers to result in arrest, be referred to trial, and result in conviction.<sup>316</sup> When asked why FCS officers have greater success dealing with sexually related crimes than other SAPS officers, a senior SAPS officer cited differences in training.<sup>317</sup> The officer noted that FCS officers participate in a four-week detective-learning program and other trainings designed to educate officers about relevant legislation and interview techniques necessary to investigate sexual assaults.<sup>318</sup>

### *Mechanisms for Holding the Police Accountable*

South Africa has several mechanisms for reporting issues of police misconduct, including the failure to prevent and respond to sexual violence by educators against learners.

First, under the regulations implementing the South African Police Service Act, a police officer may be disciplined internally for misconduct.<sup>319</sup> An officer is guilty of misconduct if, among other things, he or she fails to comply with a law, regulation, or legal obligation; unfairly

discriminates against or is disrespectful to another; or fails to carry out an order or instruction.<sup>320</sup> Misconduct may include, for example, failing to take seriously the claim of a victim of sexual violence, turning her away because of a delay in reporting, interviewing her in full view and hearing of others, or neglecting to make arrangements for necessary medical assistance – all violations of the National Police Instruction on Sexual Offences.<sup>321</sup> Allegations of misconduct trigger internal disciplinary procedures, which may result in sanctions, including dismissal.<sup>322</sup> An individual may call a SAPS hotline to report police misconduct. Gareth Newham, Head of the Governance, Crime and Justice Division of the Institute for Security Studies, estimates that this internal reporting process has resulted in the discipline of 5,500 officers each year.<sup>323</sup>

The newly established Civilian Secretariat for Police (the Secretariat) provides an additional mechanism to promote accountability within the police.<sup>324</sup> Among other functions, it is mandated to “assess and monitor the police service’s ability to receive and deal with complaints against its members.”<sup>325</sup> The Secretariat has also assumed the duty previously held by the Independent Police Investigative Directorate (another oversight body)<sup>326</sup> to monitor SAPS’ compliance with the Domestic Violence Act. As noted above, the DVA provides for the issuance and enforcement of protection orders in domestic violence cases, and at least one court has found the Act applicable to sexual violence by educators against learners.<sup>327</sup> Under the DVA, SAPS must institute disciplinary proceedings against a police officer who fails to comply with the DVA and inform the Secretariat, which may make recommendations about disciplinary measures.<sup>328</sup> The Secretariat and National Commissioner of SAPS must report to Parliament biannually on the handling of these reports.<sup>329</sup>

In October of 2013 the Constitutional Court decided *Minister of Police and Others v Premier of the Western Cape and Others*, which affirmed the authority of the Premier of the Western Cape Province to establish a commission on police accountability in that province.<sup>330</sup> The Premier formed the O’Regan/Pikoli Commission in response to a complaint by civil society members, which “alleged inefficiencies in the performance of the Police Service and the City of Cape Town Municipal Police Department (Metro Police) operating in the community.”<sup>331</sup> In its decision, the Court referenced Section 206(3) of the Constitution, which authorises the provinces to monitor the conduct of the police and oversee its effectiveness, efficiency, and relations with the community.<sup>332</sup>

## **Challenges**

Underreporting is an important obstacle that negatively affects the ability of SAPS to respond effectively to school-based sexual violence.<sup>333</sup> While there are many reasons that learners do not report educators’ sexual abuse to the police, one factor is their scepticism that the police will believe them and administer justice fairly.<sup>334</sup> Although the re-establishment of the victim-friendly FCS Units is a step in the right direction, many members of the public doubt the integrity of the

police and their willingness to prosecute sexually related crimes.<sup>335</sup> This perception is exacerbated by learners' lack of contact with and knowledge about the FCS.<sup>336</sup> Moreover, some victims of violence, particularly those in rural areas, do not have access to an FCS Unit and must rely on regular SAPS officers, who lack specialised training.<sup>337</sup>

Community members interviewed by the research team reported that the police tend to “drag their feet” when handling sexual violence cases.<sup>338</sup> Thsobo, a community member, noted that incidents of sexual abuse in schools “are happening every day but the police are not making sure that perpetrators are being arrested.”<sup>339</sup> Maraja, another community member, observed that the police do not take seriously cases involving sexual violence by educators against learners. “Girls do not feel comfortable reporting to the police,” she explained, “because [the police] will laugh and mock [them,] and [they] will be traumatised.”<sup>340</sup> Gareth Newham observed that police officers do not view sexual violence as “tough police work” and therefore do not like handling such cases. He explained, “The mind-set is that sexual violence is a social problem, therefore it should be dealt with through social programs.”<sup>341</sup>

SAPS officers must understand the power dynamics that are at play when an educator is an alleged perpetrator of a sexual offence. In order for this understanding to exist, SAPS should provide its officers with training that focuses on cross-cultural competency and understanding of the issues faced by victims of sexual offences. This should take into account the victim's psychological wellbeing and ensure that she has access to necessary psychosocial support. Such training should be extended to SAPS officials as a whole, not just those in the FCS Unit.<sup>342</sup>

In addition to the insensitive attitudes of some police officers, inadequate investigations impede access to justice for victims of violence.<sup>343</sup> In an interview at the Benoni Police Station, FCS Detective Kaiser Mbele spoke of the many challenges that he and his colleagues have encountered in conducting investigations.<sup>344</sup> These included high caseloads, a shortage of vehicles for transporting victims to and from clinics, limited space for interviewing children, a lack of cameras for recording the testimony of children, and an absence of social workers in each FCS Unit. Detective Mbele also reported that a lack of counselling services for FCS officers who daily handle difficult sexual abuses cases contributes to burnout and diminished retention. The lack of resources results in FCS Units that are understaffed and overworked, which makes it less likely that cases will receive the attention necessary to collect evidence and prevent attrition.<sup>345</sup> Moreover, there needs to be continuity when FCS officers are on leave and cases are left unattended or on long delays.<sup>346</sup>

Police accountability also could be strengthened by expanding police collaboration with schools. To this end, Detective Mbele suggested that the police take a preventative approach by improving visibility and participation in schools. School-specific protocols and increased communication

among learners, schools, and the police are necessary to build trust with victims and increase accountability between agencies.<sup>347</sup> Detective Mbele suggested that FCS officers visit the schools in their precinct quarterly to establish relationships with learners and encourage reporting.<sup>348</sup> A similar program was implemented in the past called “adopt a cop.”<sup>349</sup> As described earlier in this report, the program paired each police officer with a school in his or her precinct in hopes of curbing violence and making police more accessible to learners. Reinstating the program may increase reporting and improve investigations since victims and school staff could report directly to the officer at their school. Victims and their parents also would know someone within SAPS to whom they could report incidents of police misconduct.

## **B. National Prosecuting Authority**

Like the police, the National Prosecuting Authority (NPA) has encountered challenges in fulfilling its obligation to investigate and prosecute sexual violence in schools. To address these issues, the NPA created a Sexual Offences and Community Affairs (SOCA) Unit in 1999.<sup>350</sup> The SOCA Unit is comprised of four sections: the Sexual Offences Section, the Domestic Violence Section, the Maintenance Section, and the Child Justice Section.<sup>351</sup> The objective of the Sexual Offences Section is: “to improve the conviction rate of sexual offences cases; reduce secondary victimisation within the criminal justice system by establishing multi-disciplinary care centres and adopting a victim-centred approach; skills development of all role players in the multi-disciplinary prosecution of sexual offences; and reducing the cycle period for the finalisation of cases.”<sup>352</sup> While the success of the Unit has not been studied in depth, the NPA has received some criticism with regard to its ability to interact with the SAPS and obtain convictions.<sup>353</sup>

Case attrition at the prosecution stage has frustrated efforts to ensure perpetrator accountability.<sup>354</sup> In 2005-06, for example, the National Prosecuting Authority prosecuted only 14% of cases, declined to prosecute 60%, and referred the rest back to the police for further investigation.<sup>355</sup> Prosecutors inconsistently exercise their discretion in determining whether or not to prosecute a case.<sup>356</sup> They may incorrectly conclude that if they lack physical evidence to corroborate the testimony of a victim of sexual violence, they do not have sufficient evidence to proceed.<sup>357</sup> In the face of public pressure to present high conviction rates, prosecutors may also be inclined to withdraw cases that they are not confident of winning.<sup>358</sup>

Lack of collaboration between investigating police officers and prosecutors during the initial investigation process is a gap that directly affects evidence collection. A senior SAPS officer stated that the NPA was not transparent or organised when handling case dockets.<sup>359</sup> The officer claimed, for example, that once an investigating officer turned a docket over to the NPA, the docket “went missing or became untraceable,” which affects SAPS’s ability to keep victims informed and to obtain additional evidence when necessary.<sup>360</sup>

The NPA also encounters challenges in obtaining DNA testing.<sup>361</sup> One prosecutor acknowledged that the NPA's requirement that prosecutors sign DNA request forms before a suspect is tested slows down the process.<sup>362</sup> An investigating police officer rarely has the time or ability to reach a prosecutor quickly so that he or she may sign the form. Since many testing centres have a six-month wait for the receipt of results, any additional delay in the process is detrimental.<sup>363</sup> In addition, prosecutors do not always have a sufficient understanding of the results of medical examinations and DNA evidence. Teddy Bear Clinic Director Shaheda Omar recommended that the NPA partner with civil society and medico-legal clinics to provide training for prosecutors on these issues.<sup>364</sup>

In addition to these difficulties in obtaining and effectively utilizing forensic evidence, prosecutors' lack of specialized training in working with child witnesses impedes the NPA's effectiveness. Magistrates often view children as unreliable witnesses.<sup>365</sup> In light of this reality, one prosecutor interviewed by the research team stressed the importance of adequately preparing a child victim for testifying in court.<sup>366</sup> While prosecutors receive training, they lack specialisation for interviewing child victims and must rely on the help of intermediaries and social workers.<sup>367</sup> The prosecutor explained that court can be intimidating even for adults; therefore it is especially important to be able to prepare children for what they will experience.<sup>368</sup> The reestablishment of specialised Sexual Offences Courts together with increased availability of intermediaries, individuals appointed to assist child witnesses, may help to address some of the challenges that compromise prosecutors' ability to effectively prosecute child sex abuse cases and protect the rights of child witnesses.<sup>369</sup>

## **C. Courts**

Like SAPS and the NPA, the court system has been affected by gaps in accountability. The challenges that sexual assault victims encounter in courts include the slowness and uncertainty of the process; the possibility of secondary victimisation; and inexperienced, insensitive, or understaffed court personnel.<sup>370</sup>

Some victims have had difficulty obtaining orders of protection or have failed to see their abusers brought to justice.<sup>371</sup> This was exemplified in an incident reported by Section 27 in which it took two lawyers to convince a magistrate that a learner who was abused by her teacher needed a protection order. The attorneys reported that what should have been a simple court proceeding turned into what felt like a full-blown trial – even though a victim is supposed to be able to obtain a protection order without an attorney.<sup>372</sup> Section 27's attorneys attributed this difficulty, in part, to judicial officers' bias in favour of educators. They suggested that some magistrates are concerned that they will unfairly harm an educator's reputation if they issue a protection order against them. This is particularly true in rural areas where educators have very high standing in

the community. In this situation, the word of a young child or teenager is held against that of a powerful community figure.<sup>373</sup>

Courts have also experienced problems in effectively implementing the important procedures established by law to protect child witnesses and victims. One legal practitioner noted that some magistrates are resistant to receiving training in communicating with children and may question them in ways that reflects a lack of understanding of why children make delayed disclosures or provide fragmented information, which leads to secondary victimisation.<sup>374</sup> As noted above, the Criminal Procedure Act<sup>375</sup> provides for the appointment of an intermediary, usually a social worker, who can help to prepare child witnesses and “translate questions posed by the magistrate, attorney, prosecutor, or alleged perpetrator, into language the child will understand.”<sup>376</sup> Yet an intermediary is not guaranteed to all sexual assault victims.<sup>377</sup> Elizabeth Steenkamp, Chief Social Worker at iThemba Rape and Trauma Centre in Benoni, argued, “There should be fewer questions about whether a child should be allowed to testify using an intermediary. All victims of abuse should be given the option to use an intermediary.”<sup>378</sup> Also, intermediaries are not always available, and some have not had adequate training.<sup>379</sup>

In addition, many courts are poorly equipped for child witnesses. Children and their intermediaries often lack special waiting rooms and must wait in corridors during court adjournments.<sup>380</sup> Additionally, due to a lack of court resources, the closed-circuit TV equipment needed to allow the witness to testify in a room away from the defendant while affording the defendant a modified form of confrontation is often broken or shared by many courts.<sup>381</sup> Some courts, such as the Johannesburg court, boast dysfunctional closed circuit television equipment that is outdated and needs to be replaced with new technology.<sup>382</sup> All of these challenges can result in cases being postponed and child victims being further traumatised.

Some of these problems may be related to the demise of South Africa’s specialised Sexual Offences Courts. Established in 1993 with the goal of making the criminal justice process more victim-friendly and enhancing perpetrator accountability, these courts were equipped with closed-circuit TV facilities, prosecutors and magistrates trained to handle sexual assault cases, and other support services for victims of violence.<sup>383</sup> Yet some people complained that the courts unfairly drew resources away from other courts. Beginning in 2005, despite increased conviction rates, the DOJ&CD slowly disbanded the specialised courts.<sup>384</sup> This had a negative impact on the handling of sexual offense cases, and conviction rates for sexual offences dropped.<sup>385</sup> Finally, the DOJ&CD appointed a Ministerial Advisory Task Team on the Adjudication of Sexual Offence to consider the desirability of re-establishing the Sexual Offences Courts. In August 2013, the Department accepted the Task Team’s findings and announced that the courts would be re-opened.<sup>386</sup>



In the report, the Task Team found that the previous Sexual Offences Courts faced significant challenges. In 2002, the SOCA Unit of the NPA had developed a blueprint of standards and procedures for the Sexual Offence Courts.<sup>387</sup> However, few courts were fully compliant with these standards.<sup>388</sup> Some of the challenges with compliance included non-standardised and ad hoc training for prosecutors and magistrates, lack of emotional support for court personnel, limited space for witness consultation, lack of an evaluation mechanism specific to the courts, and limited access to the courts for victims in remote areas.<sup>389</sup> Prosecutors working for the courts felt that “they needed effective management, training, emotional support and multi-disciplinary participation to overcome these obstacles.”<sup>390</sup> Magistrates appointed to the courts were reluctant to accept the appointment not only because of the emotional trauma, but because they felt specialising in the sexual offences would limit their career opportunities.<sup>391</sup>

Based on the Task Team’s report, the DOJ&CD has proposed changes to the re-established courts. In a 2013 media statement, it noted that changes to the new courts would include specially trained officials to reduce the chance of secondary trauma, special rooms where victims can testify, a private waiting room for children, and a program that will help witnesses prepare for court and provide debriefing after they have testified.<sup>392</sup> Additionally, each court will be staffed with a magistrate, two prosecutors, an intermediary, a designated court clerk, a designated social worker, a legal aid practitioner, and a victim support officer.<sup>393</sup> In addition, the Department plans to train magistrates and prosecutors on the Sexual Offences Act and the Child Justice Act.<sup>394</sup> It is also considering rotating magistrates and prosecutors to prevent burnout, although experts caution that this may cause delays and a lack of necessary specialisation.<sup>395</sup> Ensuring that service to these courts is given a high status and is attractive to top professionals may be a more valuable way to guarantee their success. If the DOJ&CD is able to make and sustain meaningful changes to the Sexual Offence Courts, this will be a major step forward in creating a cohesive criminal justice approach to sexual violence.

## **D. National Offenders’ Registers**

Two important accountability mechanisms within the criminal justice system are the national offenders’ registers. Chapter 6 of the Sexual Offences Act makes provision for the establishment of a National Register for Sex Offenders,<sup>396</sup> and the Children’s Act makes provision for the National Child Protection Register.<sup>397</sup>

### ***National Register for Sex Offenders***

The purpose of the National Register for Sex Offenders is to stop incidents of sexual abuse against children and mentally disabled people.<sup>398</sup> The Register identifies offenders who were convicted of a sexual offence against a child or a mentally disabled person.<sup>399</sup> In some jurisdictions, like the United States, the contents of the NRSO are public information, whereas in South Africa the DOJ&CD maintains a private register.<sup>400</sup> This creates problems of access, as



only certain individuals, upon applying for a certificate, may be granted access to the contents of the NRSO.<sup>401</sup> These individuals include employers such as schools, crèches, and after-care facilities, hospitals, hospices, and any other employers who require potential employees to work with children or people with mental disabilities.<sup>402</sup> The reach of NRSO extends to prohibiting people who have been convicted of sexual offences from applying for adoption or foster care.<sup>403</sup> However, despite the fact that DOJ&CD collaborates with entities such as the Department of Health, SAPS, the Department of Social Development (DSD), and the Department of Correctional Services and may gain access to their records, these other entities do not have direct access to the Register.<sup>404</sup> Moreover, members of School Governing Bodies do not have access to names on the Register, which prevents SGBs from helping to ensure that teachers whose names are on the register are not hired at their school.<sup>405</sup>

The management of the NRSO is housed within the Promotion of the Rights of Vulnerable Groups Unit, which is located in the Court Services Branch of the DOJ&CD. The unit is also responsible for implementation of the Sexual Offences Act and Children's Act. At present, there are approximately 14,000 offenders in the register.<sup>406</sup> In order to add the names of convicted individuals to the NRSO, DOJ&CD hired data capturers to travel around the country searching for court records and checking the information against the case numbers submitted by SAPS.<sup>407</sup> DOJ&CD also relies on the Department of Health to ensure that information relating to the mental state of the person accused of a sexual offence is accurately recorded.<sup>408</sup> Approximately 39,000 cases still need to be reviewed and information captured in order to bring the Register up to date.<sup>409</sup>

### ***National Child Protection Register***

To fulfil South Africa's international law obligations and enhance the protection of its children, the South African Law Reform Commission recommended the creation of a National Child Protection Register.<sup>410</sup>

Section 111 of the Children's Act requires the Director General of the Department of Social Development to maintain a NCPR which, similar to the NSRO, is a private register.<sup>411</sup> Although the NCPR is a private register, it allows certain people or entities, including designated child protection organisations and members of SAPS who work on child protection,<sup>412</sup> to access the contents of the Register, making it less likely to impede accountability than the NRSO. Part A of the Register is intended to be a repository of information relating to all reports and convictions relating to abuse or deliberate neglect of a child.<sup>413</sup> The NCPR also contains court findings that a child is in need of care and protection because of abuse or deliberate neglect.<sup>414</sup> Part B is a record of all people who have been deemed to be unfit to work with children.<sup>415</sup> Prior to hiring any person to work at a government institution providing services to children (such as a school), the person managing the institution (such as school administrators) must check to see whether that

person's name is listed in Part B of the Register.<sup>416</sup> If a candidate's name appears in the Register, the institution is prohibited from employing that person.<sup>417</sup> The contents of the Register also should be used to inform policies, budgets, and interventions for matters relating to children who have been abused on a local, provincial, and national level.<sup>418</sup> The importance of the contents of the NCPR cannot be overstated, as the availability of this kind of data is seminal in identifying trends and areas where the prevalence of child abuse is high, informing advocacy initiatives, and guiding policy and law reform.<sup>419</sup>

## VI. Accountability in the Provision of Victim and Survivor Support

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One critical aspect of South Africa's responsibility to respond to sexual violence by educators against learners is its duty to provide robust services to the learners who have been subjected to such abuse. The government can arrest and prosecute abusers, but in order for the victim to make it through medical exams, testify in court, return to school, and eventually recover he or she must have access to a myriad of specialised support services. These services range from medical examinations to legal assistance to psychotherapy and trauma counselling. Where the government fails to provide such services, it denies victims adequate remedies for the crimes committed against them. In this way, the government becomes complicit in the crimes and often re-victimises individuals in the process.

In South Africa, the government has relied heavily on the country's active civil society organisations to provide needed services to victims and survivors. Although collaborating with civil society can be an effective approach to the provision of social services, it carries challenges in terms of coordination, consistency, scalability, and sustainability. More importantly, it does not absolve the government of its responsibility to ensure that victims are provided with the assistance and protection they need.

This section discusses the victim and survivor services provided by the government and, especially, by civil society organisations in Gauteng. It considers medico-legal services, therapeutic services, and court preparation and legal aid. It also discusses some of the gaps that exist and the implication of these gaps for government accountability in the area of victim and survivor assistance.

### A. Medico-Legal Services

The South African Department of Health provides medico-legal services to victims of sexual assault.<sup>420</sup> These services include medical care, as well as the collection and recording of medical evidence for the criminal justice system.<sup>421</sup> For example, the Sexual Offense and Community Affairs Division of the National Prosecuting Authority supervises a network of Thuthuzela Care Centres throughout the country.<sup>422</sup> They are located in major hospitals, including the Chris Hani Baragwanath Hospital in Soweto.<sup>423</sup> A multi-disciplinary team of government officials and designated civil society organisations manage these one-stop centres.<sup>424</sup> Among other services, the centres offer a victim-friendly reporting process, medical examination, counselling, transportation, legal consultations, and court preparation.<sup>425</sup> The Thuthuzela Care Centres have been praised internationally as a best-practice model of integrated, survivor-centred services.<sup>426</sup>

Like other institutions, however, they have encountered implementation problems such as frequent vacancies and a lack of skilled personnel trained to work with children.<sup>427</sup>

The Gauteng Health Department has established several medico-legal clinics to provide services for victims of sexual violence. The Medico-Legal Clinic in Hillbrow handles medical issues that have a legal component, including child abuse and rape.<sup>428</sup> Sexual abuse cases in the neighbourhood are referred to the clinic from the FCS or general SAPS office, or the abused person can go to the clinic directly. Dr. M. Babar of the Hillbrow clinic reports, “Here we don’t have any legal or law enforcement officers, but we work closely with the FCS and police. The police know us well and will bring the patient here or come if we call.”<sup>429</sup> The clinic primarily provides medical services, encouraging follow-up visits at three and six months to test for HIV/AIDS and address other issues. The clinic also provides free prophylactic antiretroviral drugs, to prevent the victim from contracting HIV, within 72 hours of a sexual assault.<sup>430</sup>

A 2002 study of government-provided medical-legal services in Gauteng found that “minimum standards of care [were] not being met, with problems of access, resource limitations, inadequate training and disparity across clinics being leading concerns.”<sup>431</sup> Stakeholders have also expressed concern about the system’s failure to cater to child victims. Children must often go to multiple service providers, who do not always have experience or training in working with children, in order to obtain the examinations and assessments required by the government for prosecution of abuse cases.<sup>432</sup> A lack of child-friendly services increases the potential for secondary victimisation and can negatively affect a survivor’s ability to obtain justice.

As a result of these service gaps, organisations such as the Kidz Clinics, the Teddy Bear Clinic, and the iThemba Rape and Trauma Centre, stepped in to provide child-friendly medico-legal services in Gauteng. These clinics all operate as “one-stop” victim service providers.<sup>433</sup> The clinics aim to reduce trauma to child victims by providing all medical and psychological services in one location rather than requiring the children to retell their stories to multiple service providers.<sup>434</sup>

The clinics are staffed with specially trained personnel and offer medico-legal services such as psychological assessments, medical examinations and treatments, and court assessment reports.<sup>435</sup> Staff members perform the initial medical exam, which involves collecting physical evidence of abuse to be submitted to the court.<sup>436</sup> If the abuse is immediately apparent, then the child is referred to a social worker and psychologist in the clinic for further forensic assessment.<sup>437</sup> The forensic assessment is submitted to the court as an objective assessment of the abuse, the child’s condition, and any other relevant factors.<sup>438</sup>

The Gauteng Department of Education, schools, and non-specialised clinics often refer children to these child-friendly clinics.<sup>439</sup> As the Kidz Clinic reports on its website, the growing number of abused children would simply “fall through the crack[s]” without their assistance.<sup>440</sup> While it is unclear what percentage of these cases involves sexual abuse of learners by their educators, it is clear that these clinics help to fill an important gap in the provision of child-friendly victim services.<sup>441</sup>

## **B. Therapeutic Services**

Inadequate access to therapeutic services is a serious problem for learners who are victims of educator-perpetrated violence. As used in this report, the term “therapeutic services” includes psychological services such as counselling and trauma support. The intense nature of learner-educator relationships and the complex process of grooming to which learners are often subjected makes these services particularly important in the case of educator-perpetrated sex abuse.<sup>442</sup>

The Gauteng Department of Education has begun to address this need by establishing a new branch that focuses on school safety and health. Among its other activities, this branch seeks to provide therapeutic support for learners who are victims of violence. A GDE official who works in this area noted that “psychosocial interventions were created for a rapid response. Learners are seen to immediately and taken through the process.”<sup>443</sup> The Department has identified 270 schools in the province as priority schools within the school safety program and is establishing programs in these schools that provide education to prevent abuse and support to learners who experience it.<sup>444</sup>

Yet, the official acknowledged that the availability of government-provided therapeutic services is limited.<sup>445</sup> As a result, a number of organisations, like the Kidz Clinic, Childline, Teddy Bear Clinic, iThemba Rape and Trauma Centre, and Thuthuzela Care Centres, have stepped forward to provide these services to victims of sexual assault.

Childline is one organisation that provides therapeutic services, many of which are targeted to learners. It also runs a toll-free hotline that is available to individuals reporting abuse or those who have questions or concerns about child abuse.<sup>446</sup> The organisation estimates that the hotline receives approximately 1 million calls per year.<sup>447</sup> The majority of calls Childline receives are from children directly or involve a report of child abuse. To the extent possible given limited resources, Childline investigates the reports, encourages families to report abuses, and provides victim-support services. It also seeks to raise awareness about its services among children in schools. It reports that one of their most successful advertising campaigns involved distributing rulers to learners that had the hotline phone number stamped onto it.<sup>448</sup>

The iThemba Rape and Trauma Centre, based in Daveyton, also provides counselling services for the Gauteng community. iThemba was founded in 2005 and continues to expand throughout Gauteng.<sup>449</sup> The Centre provides counselling for adult and child victims of abuse through a number of Victim Empowerment Centres (“VECs”). Currently, iThemba has 8 VECs located at local police stations, which are staffed by 6 social auxiliary workers and 42 volunteers. Funding and personnel shortages means that the auxiliary workers must rotate among the VECs and that none of the Centres has a full-time staff. Despite these shortages, the VECs have someone on call 24 hours a day who can respond to emergency calls.<sup>450</sup> After iThemba conducts medico-legal assessments, victims are encouraged to return for continued counselling.<sup>451</sup>

### **C. Court Preparation Services**

Service providers report that courts are unprepared for child victims.<sup>452</sup> As an example of this, they point to the fact that most courts do not offer separate waiting areas for child victims. As a result, children are often being forced to sit in the same hallway as their abuser while they wait to be seen by the court. Service providers like the Kidz Clinic, Teddy Bear Clinic, and Childline have stepped up to address this issue and others like it by providing court preparation assistance. They find that preparation reduces secondary trauma by mentally preparing children for the stress that can accompany in-court testimony.<sup>453</sup>

Some of the organisations and clinics mentioned above have created replicas of real courtrooms where child witnesses can become accustomed to the layout of the courtroom, the type of questions that will be asked in court, and other court procedures.<sup>454</sup> Staff members may accompany the child to court to provide additional support. They also work closely with the victim’s support network such as parents, extended family, educators, friends, and other community workers, and emphasise the importance of this network of support to the victim’s continued recovery.<sup>455</sup>

### **D. Legal Services**

Free legal services are not widely available in South Africa. Learners who are abused by educators must depend upon a criminal justice process that does not always take their interests into account, and they rarely have the means to seek legal advice or pursue civil remedies. In response, a number of organisations, such as Section 27, Childline, and Lawyers Against Abuse, have developed programs to provide legal services to indigent individuals.

For example, Section 27 is a public interest law centre that provides legal services to individuals on a wide spectrum of issues, including education.<sup>456</sup> Section 27 staff members report that they have handled a number of cases involving educator-learner abuse. These cases have ranged from forcible rapes to quid pro quo cases involving the exchange of sex for grades. They work to obtain restraining orders against abusers, ensure that the DBE takes action against abusers,

encourage prosecutors to see cases through, and file civil claims against abusers. In addition, Section 27, together with CALS and Lawyers Against Abuse,<sup>457</sup> recently developed and released a handbook for learners and their families. The handbook is a step-by-step practical guide to reporting and pursuing sexual violence cases.<sup>458</sup>

To prevent the criminal justice system from failing victims, organisations such as Childline, the Kidz Clinic, and the Teddy Bear Clinic also push for prosecutors and police to take action and pursue child abuse cases. They support victims and their families throughout the criminal justice process. They do this by tracking cases as they progress to ensure that each responsible actor effectively performs his or her job and that institutional failures do not block a victim's access to justice. They seek to ensure that no case falls between the cracks.<sup>459</sup>

## **E. Challenges**

The service providers described above have stepped forward to provide important resources to victims and survivors of sexual violence. Without their support, it is likely that many victims would not have access to crucial services. Their work is incredibly important and helps to fill critical gaps in government services. Yet these organisations face a number of challenges that prevent them from providing services to all victims who need their assistance.

Almost every service provider interviewed cited inadequate resources as the greatest challenge he or she faces in providing services to victims of sexual abuse. Although the Department of Social Development is charged with delivering and funding therapeutic services for children, they have failed to adequately support the organisations that provide these services.<sup>460</sup> Elizabeth Steenkamp of the iThemba Rape and Trauma Centre in Benoni explained that her Centre, like other service providers, has two distinct types of staffing problems. First, it lacks funding to hire the number of staff members needed to meet the demand for social services. Second, it finds it difficult to recruit and retain highly trained staff members to fill open positions.<sup>461</sup> If service providers hire inadequately educated and trained staff, these individuals may contribute to the traumatisation of victims, simply due to lack of knowledge.<sup>462</sup>

Other challenges for service providers include the multiple social, economic, and other barriers that prevent learners from reporting abuse and the tendency of school administrators to handle complaints internally before referring learners to service providers. Where learners do not report or seek legal redress for abuse, they are also unlikely to seek counselling or other types of victim and survivor services.<sup>463</sup> They may also be unaware of the services that are available.<sup>464</sup> In addition, cases involving the abuse of learners by educators often go through a specific “chain of command” within the education system, and victims do not come to clinics until well after the abuse occurred.<sup>465</sup> At this stage, it becomes more difficult for service providers to provide effective legal, psychological, and other types of support.<sup>466</sup>

In addition, the diversity of one-stop centres and other government and civil society resources may be confusing for victims and risk duplication of resources. A GDE official noted that it is difficult for government bureaucracies to provide coordinated services to victims, and that service providers too often tend to work in “silos.”<sup>467</sup> In 2013, the Task Team charged with looking into the re-establishment of Sexual Offences Court expressed concern about the lack of coordination of victim and survivor services.<sup>468</sup> It explained:

In practice, services are not universally available and access to services is unequal. Although infrastructure and resources in this regard have gradually been increased, this is being done very slowly and often with temporary donor funding. These difficulties could be attributed to the fact that there is currently no dedicated government plan setting out minimum services for victims of sexual offences or minimum levels of specialisation. In addition, services are fragmented between different departments and this gives rise to issues of lack of coordination of services. This lack of coordination seriously hampers the efficacy of services.

Although the team recognised the important role of civil society organisations, it appropriately placed responsibility for ensuring that victims have access to the services they need squarely on the shoulders of the government.<sup>469</sup> It thus urged the government to develop a policy framework to improve the coordination, effectiveness, and sustainability of existing services.<sup>470</sup> Establishing a framework of this nature and providing the resources necessary to implement it would enable government and civil society organisations to work together more effectively in helping victims obtain justice and heal from their abuse.



## VII. Accountability and South Africa's Chapter Nine Institutions

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Chapter 9 of the Constitution of South Africa created institutions independent of the government that are intended to strengthen South Africa's constitutional democracy. Due to their nature and the way in which they were formed, these institutions serve as a "watchdog" over government institutions, exposing unlawful practices, and offering critiques of government programmes and activity.<sup>471</sup> Each institution has its own mandate but in general is empowered with strong investigative powers and administrative capacities.<sup>472</sup> Some also enjoy a legal mandate that includes taking cases to court, recommending individuals for prosecution, and exercising subpoena and search and seizure powers.<sup>473</sup> Although their recommendations do not have the force of law, they do have the power to require answers or explanations from government and other actors.<sup>474</sup>

Three of these institutions are most relevant in respect of addressing sexual violence in schools: the Public Protector, the South African Human Rights Commission, and the Commission for Gender Equality. This section discusses the respective mandates of each of these institutions and its investigative activities and recommendations regarding sexual violence in schools. It also considers some of the challenges these institutions face and the implications of these challenges for state accountability.

### A. Public Protector

The Public Protector's office was inaugurated on 25 November 1994 by the Public Protector Act 23 of 1994. The efforts of the Public Protector in carrying out its mandate have proven that it is an independent body and inspired confidence in the community. In terms of Section 182 of the Constitution, the functions of Public Protector are to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action.

To date, the Public Protector's office has intervened on a limited basis to hold perpetrators of sexual violence in schools accountable. A KwaZulu-Natal primary school employee, serving a five-year suspended sentence for sexually assaulting a learner, was dismissed after Public Protector Advocate Thuli Madonsela questioned his continued employment at the school.<sup>475</sup> The educator, Mongameli Gcwabaza, was charged with sexual assault in June 2008 and pleaded guilty to criminal charges based on his conviction at a hearing that formed part of disciplinary proceedings instituted by the provincial Department of Education.<sup>476</sup> The disciplinary

proceedings resulted in a sanction of dismissal.<sup>477</sup> After being charged, Gcwabaza was transferred to the circuit office of the provincial Department of Education.<sup>478</sup> After being sentenced, he was then redeployed back to resume his post as an educator at his previous school.<sup>479</sup> The matter came to the attention of the Public Protector when a concerned parent of a learner at the same school complained. This prompted an investigation, which resulted in Gcwabaza's dismissal.<sup>480</sup>

The mandate of the Public Protector to ensure accountability of perpetrators of sexual abuse should be further explored. The Public Protector is well placed to assess and address the lack of accountability of educators within the context of the criminal justice system.

## **B. South African Human Rights Commission**

The South African Human Rights Commission was inaugurated on 2 October 1995 under the Human Rights Commission Act 54 of 1994. In terms of Section 184 of the Constitution, the SAHRC must promote respect for human rights and a culture of human rights, promote the protection, development and attainment of human rights, and monitor and assess the observance of human rights in the Republic. The Commission has the powers, as regulated by the national legislation, necessary to perform its functions, including the power to investigate and report on the observance of human rights, take steps and secure appropriate redress where human rights have been violated, carry out research, and educate both the public and government.<sup>481</sup>

The SAHRC has made periodic interventions in the past 10 years that have addressed school-based sexual violence. For example, the SAHRC compiled a report in 2006 on school-based violence after conducting public hearings in which it explored the extent of the problem.<sup>482</sup> According to the report, "Violence perpetrated by educators and other school staff includes corporal punishment, cruel and humiliating forms of psychological punishment, sexual and gender-based violence and bullying."<sup>483</sup> The report noted that, according to a study conducted by the Thohoyandou Victim Empowerment Programme (TVEP), of 1,227 female learners who were victims of sexual assault, 8.58% of these female learners had been assaulted by educators.<sup>484</sup> The report indicated that in many of the incidents, proper disciplinary processes were not followed, and educators formally resigned from their posts when they were charged. In other cases, the report found that many learners or their parents withdrew the cases.<sup>485</sup> Based on the public hearings it conducted, the SAHRC made recommendations including that the DBE make schools safer places by making available reporting mechanisms to learners, parents and educators or improving on mechanisms already in place; facilitating an open discourse with the members of the community and learners alike; monitoring areas where learners were unsafe, such as toilets and empty classrooms; creating accessible and child friendly reporting systems; and providing accessible and child friendly treatment services for victims of sexual violence.<sup>486</sup>

In September 2006, the Commission approached the High Court to obtain an order against the Gauteng Provincial Department of Education to ensure that the Department use its disciplinary procedures, as set out in the South African Schools Act, against an educator accused of sexually assaulting a learner.<sup>487</sup> The Commission argued that the human rights of learners are disrespected when victims of sexual violence are forced into situations of on-going trauma or secondary victimisation due to the alleged educator-perpetrator being present in the same classroom.<sup>488</sup>

More recently, the SAHRC's record of promoting accountability for educator-perpetrated sexual violence against learners has been a mixed bag. Although in 2012, the SAHRC launched the Charter of Children's Basic Education Rights, which was hailed by UNICEF as the most comprehensive charter in the world,<sup>489</sup> the document makes no explicit mention of school-based violence, particularly sexual violence against learners by educators. In 2013, the SAHRC found that the Department of Social Development did not fulfil its obligation to comply with the Children's Act of 2005 in relation to the maintenance and population of the National Child Protection Register.<sup>490</sup> The SAHRC recommended that the DSD provide it with an updated Child Protection Register and an audit report detailing challenges and needs; that the Department of Women, Children and Persons with disabilities increase its monitoring of the Child Protection Register; and that the DOJ&CD develop a comprehensive programme for training and awareness of court officials regarding their duties under the Children's Act to support the accurate, timely updating of the Child Protection Register and report on interim measures it plans to implement.<sup>491</sup> SAHRC also recommended that DOJ&CD consider reviewing the NCPR in relation to the National Register of Sex Offenders, expressing concern about the potential for duplication of resources and stating that "the viability of a binary register system must be explored."<sup>492</sup>

The SAHRC has many roles to play within the context of sexual violence in schools. Not only does it have the power to conduct research, facilitate rights-education workshops, and recommend that state actors take certain actions, it also has powers to subpoena witnesses and conduct certain searches and seizures.<sup>493</sup> The full mandate of the SAHRC should be explored in furtherance of ensuring that educator perpetrators and other relevant government actors are held accountable, respectively, for the sexual abuse of learners and institutional failures to prevent and respond to it.

### **C. Commission for Gender Equality**

The composition, powers, and functions of the Commission for Gender Equality (CGE) are set out in the Commission for Gender Equality Act 39 of 1996. Section 187 of the Constitution also sets out the functions of the CGE, which include the promotion of respect for gender equality; the protection, development and attainment of gender equality; and the power to monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality.

In 2013, the CGE drafted a concept note entitled “School Related Gender–Based Violence, Violence against Women and Girls: A South African Perspective,”<sup>494</sup> which notes that it is imperative for the Public Protector, SAHRC, and CGE to work together in order to eradicate sexual abuse from South Africa’s schools. The document calls on these entities to interrogate their role in eradicating school-based sexual abuse and violence against women in particular.<sup>495</sup>

The CGE’s concept note relating to sexual violence in schools does not go beyond stating which entities need to work together and what they should address.<sup>496</sup> The problem statement does not address educator accountability, nor does it consider the consequences of educators acting with impunity. The CGE should consider using this concept note as the basis for an operational project that could attempt to coordinate the Chapter 9 institutions around the issue of sexual violence in schools and educator impunity.<sup>497</sup>

# Recommendations

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Drawn from our desk and field research, the following recommendations seek to inform the efforts of the South African government and civil society to address the gaps in accountability that exist for sexual violence by educators against learners in school.

## **To the South African Department of Basic Education (DBE):**

- Strengthen preventative measures in schools:
  - Distribute guidelines and informational pamphlets to learners and educators across South Africa.
  - Ensure that every child is educated about his or her rights and responsibilities and made aware of what behaviour by educators is illegal through school outreach programmes.
  - Institute mechanisms or incentives that encourage schools to report teachers who sexually abuse students.
  - Ensure that all educators, support staff, parents, School-based Support Teams, and School Governing Bodies undergo regular training on identifying abuse within the school structure, its management, and its referral system.
  - Screen all prospective teachers against DBE records, with DBE playing an oversight role for public schools and South African Council for Educators playing an oversight role for private schools.
- Improve reporting and investigation processes:
  - Provide clarity in reporting mechanisms for incidents of sexual violence in schools.
  - Ensure that the same investigator is assigned to work with learner victim throughout the multiple investigation processes to avoid further traumatising.
  - Ensure that all Labour Relations Officers tasked with investigating sexual abuse cases receive thorough and ongoing training in law, policy, and procedure.
- Streamline disciplinary procedures:
  - Minimise possibility of retraumatisation by exploring the possibility of using video or Skype testimony to reduce the number of times a learner complainant must testify at a disciplinary hearing.
  - Require entities to collaborate on questioning a child witness where procedures need to be separate or institute modified procedures, such as the “box” used in children’s courts, so that a child complainant doesn’t need to face his or her abuser.
  - Consider providing learner victims with intermediaries to assist them during disciplinary hearings.
  - Explore the feasibility of utilising pre-dismissal arbitration hearings more often to avoid duplicative hearings.

- Mandate the DBE to report the outcomes of disciplinary hearings to SAPS for criminal investigation.
- Ensure better coordination between the DBE, South African Council for Educators, and Department of Social Development ensure that the disciplinary procedure that concludes with an educator's dismissal also results in submission of the educator's name to the National Child Protection Register.

**To the South African Council for Educators (SACE):**

- Consider increasing SACE membership fees so as to raise additional resources for SACE to conduct proper investigations and hold disciplinary procedures.
- Report to DBE information about any educators SACE has declared to be unfit to practice.
- Report all allegations of sexual abuse by an educator to the South African Police Services.
- Ensure that all educators receive regular ethics training relating specifically to educator-learner relationships.

**To Teachers' Trade Unions:**

- Adopt a zero-tolerance approach to sexual violence by member educators against learners.
- Ensure that members are always alerted to the legislation and policies governing sexual violence in schools by educators.
- Provide regular training for member educators around the implications of sexual violence on an educator's career and the multiple disciplinary processes that may occur, and ensure that this training is accessible and affordable for all members.
- Create a safe space where educators can report colleagues without fear of their own reputations being damaged.
- Impose strict internal disciplinary measures for members who are perpetrators of sexual violence.
- Share the outcome of the disciplinary measures with other unions if the educator decides to join another union.

**To the South African Police Services (SAPS):**

- Require rigorous training for all police officers on issues of sexual violence generally and sexual violence in schools specifically, including:
  - Cross-cultural competency and understanding of the issues faced by victims of sexual offences;
  - The social dynamics of educator-learner relationships and how these dynamics can affect a case of sexual abuse by an educator;
  - The probative value of different types of evidence that may be present in a sexual abuse case; and

- The disciplinary consequences of committing misconduct by failing to comply with any legislation, regulations or National Instructions dealing with abuse.
- Increase the number of officers assigned to Family Violence Child Protection and Sexual Offence Units (FCS Units).
- Ensure that the FCS Units have access to the resources that they need in order to conduct effective investigations and provide support to victims of sexual abuse.
- Strengthen accountability mechanisms to ensure that police officers take seriously allegations of sexual abuse in schools and conduct comprehensive and effective investigations.
- Provide SAPS officers with access to counselling services in order to prevent secondary trauma and burnout.
- Develop a formal reporting system through which SACE and DBE submit outcomes of disciplinary hearings to SAPS in order to initiate or inform criminal investigation of the disciplined educators' conduct.
- Draft model guidelines and procedures for SAPS officials regarding incidents in which educators are perpetrators of a sexual offence, incorporating safeguards included in the Sexual Offences Act, the Protection from Harassment Act, and the National Instructions.
- Create public-awareness campaigns that inform the public about the FCS and encourage individuals, including learner victims of abuse and their families, to contact the unit if they require assistance.

**To the South African National Prosecuting Authority (NPA):**

- Expand training for prosecutors working with child and adolescent victims, including on the psychosocial effects of sexual abuse of victims and their families.
- Partner with civil society and medico-legal clinics and provide training for prosecutors to ensure a thorough understanding of the results of medical examinations and DNA evidence.
- Create a mechanism for holding prosecutors accountable for the manner in which they deal with victims of sexual abuse.
- Ensure that all prosecutors have access to counselling services.
- Ensure that prosecutors working on sexual abuse cases have access to the results of forensic tests within a reasonable time.
- Make clear to prosecutors that they should not withdraw sexual offences cases on the sole basis that physical evidence is not available to corroborate the victim's testimony.
- Consider abolishing the requirement that prosecutors sign DNA evidence request forms.

**To the Department of Justice and Constitutional Development (DOJ&CD):**

- Provide training for magistrates relating to the psychosocial effects of sexual abuse, evidentiary issues in sexual offences cases, and the social aspects of educator-learner relationships.



- Ensure that the new Sexual Offences Courts are equipped with closed-circuit TV, private waiting rooms, and other child-friendly features and staffed with highly qualified and well-supported magistrates, prosecutors, and intermediaries.
- Ensure that all Sexual Offences Court staff members have access to free counselling services.
- Ensure compliance with findings of 2013 South African Human Rights Commission (SAHRC) report on the National Child Protection Register, including by:
  - Developing a comprehensive programme for training court officials on their duties under the Children's Act to support the accurate and timely updating of the NCPR and reporting on the interim measures it plans to implement; and
  - Reviewing the NCPR in relation to the National Register of Sex Offenders (NRSO), to explore the viability of a binary register system.
- Establish a protocol for courts, upon conclusion of a case, to submit the relevant information to the DOJ&CD for the inclusion of names on the NRSO.
- Ensure that the National Register for Sex Offenders and the National Child Protection Registers are regularly populated with the particulars of individuals who are unfit to work with children, including by:
  - Conducting periodic audits of the NRSO and the NCPR to verify that the individuals listed are not working in positions that require them to have interactions with learners;
  - Promoting coordination between the DBE, SACE, DOJ&CD, and the Department of Social Development in maintaining and updating the registers; and
  - Creating a double lock system whereby SACE gains access to the registers before issuing an educator with a certificate of registration and DBE gains access to the registers before offering an educator employment.

**To the Department of Social Development (DSD):**

- Ensure compliance with the findings of the SAHRC report on NCPR, specifically by providing SAHRC with an updated register and an audit report detailing challenges and needs.
- Ensure provision of adequate resources to organisations that provide direct services to children.

**To the South African Judiciary:**

- Provide specialised training, including training to identify and understand the psycho-social impact of sexual violence, for all judges and magistrates handling child sex abuse cases.
- Develop programs that encourage highly qualified magistrates to accept posts in the Sexual Offences Courts and reward good service with professional recognition and opportunities for advancement.

**To Chapter 9 Institutions:**

- Collaborate with government agencies to provide rigorous training for individuals within the government who may work with children who have been sexually abused by an educator.
- Exercise full constitutional powers, including strong investigative, legal, and administrative powers, to ensure the accountability of educators who sexually abuse children.
- Facilitate communication, coordination, and collaboration between civil society and the government in addressing gaps in accountability and identifying approaches to sexual violence that are producing positive results.

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# Endnotes

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## Chapter I: Introduction

<sup>1</sup> This report adopts the World Health Organization's definition of sexual violence: "[A]ny sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work." World Health Org., *World Report on Violence and Health* 149 (2002), available at [http://whqlibdoc.who.int/publications/2002/9241545615\\_eng.pdf](http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf).

<sup>2</sup> Human Rights Watch, *Scared at School: Sexual Violence Against Girls in South African Schools* 36 (2001), available at <http://www.hrw.org/reports/2001/safrica/>.

<sup>3</sup> *Id.* at 44–47.

<sup>4</sup> South African Human Rights Commission, *Report of the Public Hearing on School-Based Violence v*, 11–12 (2006), available at <http://www.sahrc.org.za/home/index.php?ipkContentID=15&ipkMenuID=19>.

<sup>5</sup> U.N. Committee on the Elimination of Discrimination against Women, 48th Sess., 17 January – 4 February 2011, ¶ 31, U.N. Doc. CEDAW/C/ZAF/CO/4 (5 April 2011).

<sup>6</sup> *Id.*

<sup>7</sup> Interview with Patrick Burton, Rosebank, Gauteng Province (22 August 2013).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Declaration on the Elimination of Violence against Women (1993), art. 4(c)-(d); CEDAW General Recommendation 19, ¶19, U.N. Doc. A/47/38 (1992); Special Rapporteur on Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council, ¶¶ 11, 18, U.N. Doc. A/HRC/23/49 (14 May 2013) (by Rashida Manjoo).

<sup>11</sup> Declaration on the Elimination of Violence against Women (1993), art. 4(c). Although state responsibility under international human rights law was traditionally thought to concern the acts or omissions of state actors, in recent years, the distinction between public and private action has eroded. It is now indisputable “that a State may incur responsibility where there is a failure to exercise due diligence to prevent or respond to certain acts or omissions of non-State actors,” including violence against women. Special Rapporteur on Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council, ¶¶ 11, 18, U.N. Doc. A/HRC/23/49 (14 May 2013) (by Rashida Manjoo).

<sup>12</sup> Special Rapporteur on Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council, ¶¶ 11, 18, U.N. Doc. A/HRC/23/49 (14 May 2013) (by Rashida Manjoo).

<sup>13</sup> Gender-based violence encompasses a wide range of violations against women and girls. It includes any number of behaviours that serve to undermine the physical, sexual, and emotional integrity of women. N. Abrahams, L. Martin, & L. Vetten, *An Overview of Gender-based Violence in South Africa and South African Responses*, in *Crime, Violence and Injury Prevention in South Africa: Developments and Challenges* 2 (Suffla and Van Niekerk, eds., 2003).

<sup>14</sup> S. Afr. Const. §§ 12 and 29, 1996.

<sup>15</sup> See discussion at *infra* Part II.

<sup>16</sup> See South African Schools Act 84 of 1996, § 3 (S. Afr.).

<sup>17</sup> Centre for the Study of Violence and Reconciliation, *A State of Sexual Tyranny: The Prevalence, Nature and Causes of Sexual Violence in South Africa* 8 (2008).

<sup>18</sup> *Id.* at 22.

<sup>19</sup> *Id.*

<sup>20</sup> Jewkes et al., *Understanding Men's Health and Use of Violence: Interface of Rape and HIV in South Africa*, MRC Policy Brief (June 2009).

<sup>21</sup> *Id.*

<sup>22</sup> Gender Links and Medical Research Council, *The War @ Home: Preliminary Findings of the Gauteng Gender Violence Prevalence Study* (2010).

<sup>23</sup> Centre for the Study of Violence and Reconciliation, *A State of Sexual Tyranny: The Prevalence, Nature and Causes of Sexual Violence in South Africa* 21 (2008).

<sup>24</sup> *Id.* at 24 (emphasis added).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

- <sup>27</sup> Id. at 52. See, e.g., S. Cox et al., The Child Rape Epidemic, Assessing the Incidence at Red Cross Hospital, Cape Town, and Establishing the Need for a New National Protocol, 97 *So. Afr. Med. J.* 950, 953 (2007)(reporting that females outnumber males six to one at a South African hospital trauma centre, but noting this may only suggest that girls are more severely injured than boys).
- <sup>28</sup> Kalichman et al., Gender Attitudes, Sexual Violence, and HIV/AIDS Risks among Men and Women in Cape Town, South Africa, 42 *J. of Sex Research* 299, 302 (2005).
- <sup>29</sup> Naeemah Abrahams, Sexual Violence Against Women in South Africa, 1 *Sexuality in Africa Magazine* 4, 4 (2004).
- <sup>30</sup> Id.
- <sup>31</sup> Michele J. Anderson, Rape in South Africa, 1 *Geo. J. Gender & L.* 789, 791 (1999-2000).
- <sup>32</sup> Rachel Jewkes and Naeema Abrahams, The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview, 55 *Social Science & Medicine* 1231, 1238 (2002).
- <sup>33</sup> Centre for the Study of Violence and Reconciliation, A State of Sexual Tyranny: The Prevalence, Nature and Causes of Sexual Violence in South Africa 83 (2008).
- <sup>34</sup> Id.
- <sup>35</sup> Rachel Jewkes and Naeema Abrahams, The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview, 55 *Social Science & Medicine* 1231, 1238 (2002).
- <sup>36</sup> Centre for the Study of Violence and Reconciliation, A State of Sexual Tyranny: The Prevalence, Nature and Causes of Sexual Violence in South Africa 90 (2008).
- <sup>37</sup> Id. at 91.
- <sup>38</sup> Id. at 94.
- <sup>39</sup> See id. at 88.
- <sup>40</sup> Human Rights Watch, Scared at School: Sexual Violence Against Girls in South African Schools 44–45 (2001), available at <http://www.hrw.org/reports/2001/safrica/>.
- <sup>41</sup> Lebogang Seale, Sex Pest Teachers are Bribing Parents, IOL News (13 June 2013), available at <http://www.iol.co.za/news/crime-courts/sex-pest-teachers-are-bribing-parents-1.1531812#.UwpujSko7IU>.
- <sup>42</sup> In some communities it is considered “abnormal” for an unmarried teacher not to leave a child or two behind in the community given his prestige as a teacher. Interview with Education Labour Relations Council Official, Gauteng Province, South Africa (17 September 2013).
- <sup>43</sup> Boledi Melita Masehela, Exploring Strategies for the Prevention of Sexual Abuse at Schools, Unpublished PhD Thesis, University of Pretoria, 16 April 2012, at 42, available at <http://upetd.up.ac.za/thesis/available/etd-04182012-102448/unrestricted/02chapter2.pdf>
- <sup>44</sup> Human Rights Watch, Scared at School: Sexual Violence Against Girls in South African Schools 44 (2001), available at <http://www.hrw.org/reports/2001/safrica/>.
- <sup>45</sup> Email from Shaheeda Omar, Director of the Teddy Bear Clinic, to Meetali Jain, Senior Researcher, Centre for Applied Legal Studies, 22 April 2014 (on file with authors).
- <sup>46</sup> Id. at 47. See also Victoria John, Sexual Abuse at Schools a “Pandemic,” *Mail & Guardian* (16 November 2012), available at <http://mg.co.za/article/2012-11-16-sexual-abuse-at-schools-a-pandemic>.
- <sup>47</sup> Human Rights Watch, Scared at School: Sexual Violence Against Girls in South African Schools 64–66 (2001), available at <http://www.hrw.org/reports/2001/safrica/>.
- <sup>48</sup> Id. at 66–69.
- <sup>49</sup> Patrick Burton and Lezanne Leoschut, School Violence in South Africa: Results of the 2012 National School Study 93 (2013).
- <sup>50</sup> Statistics South Africa, General Household Survey 18 (2013), available at <http://www.statssa.gov.za/publications/P0318/P0318August2012.pdf>.

## Chapter II: Methodology

- <sup>51</sup> Patrick Burton and Lezanne Leoschut, School Violence in South Africa: Results of the 2012 National School Study (2013).
- <sup>52</sup> Id. at 2.
- <sup>53</sup> Id. at 7.
- <sup>54</sup> Id. at 22.
- <sup>55</sup> Id.



### Chapter III: Law and Legal Obligations

- <sup>56</sup> International Covenant on Civil and Political Rights (ICCPR), art. 7; Convention Against Torture, arts. 1, 2, 16. See U.N. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women ¶ 7, U.N. Doc. A/47/38 (1992).
- <sup>57</sup> International Covenant on Civil and Political Rights, art. 9 [hereinafter ICCPR].
- <sup>58</sup> See U.N. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, ¶ 7, U.N. Doc. A/47/38 (1992).
- <sup>59</sup> ICCPR, art. 2.
- <sup>60</sup> Convention on the Elimination of All Forms of Discrimination Against Women, art. 2 [hereinafter CEDAW].
- <sup>61</sup> U.N. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, ¶ 1, U.N. Doc. A/47/38 (1992)..
- <sup>62</sup> Convention on the Rights of the Child, art. 34 [hereinafter CRC].
- <sup>63</sup> *Id.*, arts. 3, 19.
- <sup>64</sup> U.N. Committee on the Rights of the Child, General Comment No. 13: Article 19: The Right of the Child to Freedom From All Forms of Violence, ¶ 33, U.N. Doc. CRC/C/GC/13 (2011).
- <sup>65</sup> CRC, arts. 24, 28. See also CEDAW, art. 10; International Covenant on Economic, Social, and Cultural Rights, art. 12 and 13 [hereinafter ICESCR]. While South Africa has not ratified the ICESCR, its signature obliges it to “refrain from acts which would defeat the object and purpose of the treaty,” according to article 18 of the Vienna Convention on the Law of Treaties.
- <sup>66</sup> Declaration on the Elimination of Violence against Women, art. 4(c); Special Rapporteur on Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council, ¶¶ 11, 18, U.N. Doc. A/HRC/23/49 (14 May 2013) (by Rashida Manjoo).
- <sup>67</sup> See Special Rapporteur on Violence Against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Human Rights Council, ¶ 71, U.N. Doc. A/HRC/23/49 (14 May 2013) (by Rashida Manjoo).
- <sup>68</sup> *Id.* ¶ 20 (“State responsibility to act with due diligence is both a systemic-level responsibility, i.e. the responsibility of States to create good and effective systems and structures that address the root causes and consequences of violence against women; and also an individual-level responsibility, i.e., the responsibility of States to provide each victim with effective measures of prevention, protection, punishment and reparations.”).
- <sup>69</sup> African Charter on Human and Peoples’ Rights, art. 5 [hereinafter ACHPR].
- <sup>70</sup> *Id.*, art. 6.
- <sup>71</sup> *Id.*, art. 2.
- <sup>72</sup> *Id.*, arts. 16-17. The African Charter also requires States to take special measures in respect of female . . . children, to ensure equal access to education” and to reduce drop-out rates. *Id.*, art. 11.
- <sup>73</sup> ACHPR, art. 1.
- <sup>74</sup> African Charter on the Rights and Welfare of the Child, art. 27 [hereinafter ACRWC].
- <sup>75</sup> *Id.*, art. 16.
- <sup>76</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 12(1)(c) [hereinafter Maputo Protocol].
- <sup>77</sup> *Id.*, art. 25.
- <sup>78</sup> S. Afr. Const. § 7, 1996.
- <sup>79</sup> *Id.* § 12.
- <sup>80</sup> *Id.* § 28(1)(d).
- <sup>81</sup> *Id.* § 28(1)(b).
- <sup>82</sup> Other relevant sections of the Constitution include section 9 (equality), section 10 (dignity), and section 28(2) (providing that “a child’s best interests are of paramount importance in every matter concerning the child”). S. Afr. Const. §§ 9, 10, 28, 1996.
- <sup>83</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 (S. Afr.) § 2. Chapter 3 of the Act is titled “Sexual Offences Against Children,” and its sections are especially relevant in the context of school-based violence. Sections 15 and 16 of Chapter 3 speak to penetrative acts of sexual violence, while sections 17-20 deal with non-penetrative sexual violations.
- <sup>84</sup> *Id.* § 3.
- <sup>85</sup> *Id.*
- <sup>86</sup> *Id.* § 57 (1)(2). Consensual sex with a mentally disabled person is also criminalised under this provision.
- <sup>87</sup> *Id.* §§15 (1),16 (1). In 2013, however, the Constitutional Court held the provision invalid insofar as it applied to the consensual sexual acts of two parties between the ages of 12 and 16. *The Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another* 2013 CCT 12/13 at paras. 49–79 (S. Afr.).

<sup>88</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007 §§ 17, 18, 19, 20 (S. Afr.).

<sup>89</sup> Id. § 42.

<sup>90</sup> Id. § 41.

<sup>91</sup> Id. The Act also requires employers to terminate the employment of anyone who fails to disclose that he or she was convicted of a sexual offense against a child. Moreover, employers must take “reasonable steps” to ensure persons listed on the register do not gain access to children during their employment. If these “reasonable steps” cannot “ensure the safety of a child...the employment relationship, the use of services or access, as the case may be, must be terminated immediately.” Id. § 46.

<sup>92</sup> Id.; see also id. § 63 (1)–(2).

<sup>93</sup> Id. § 66.

<sup>94</sup> Protection from Harassment Act, 2011, § 1–2.

<sup>95</sup> Mabuza Earnest, Court Moves to Shield Pupil from Teacher, Business Day Live (8 August 2012), available at <http://www.bdlive.co.za/articles/2012/04/17/court-moves-to-shield-pupil-from-teacher;jsessionid=ED9E968014433F9594C2216CEF2AE81F.present1.bdfm>.

<sup>96</sup> Id.

<sup>97</sup> Section 27, Press Release, Victims of School-Based Violence Afforded Protection under Domestic Violence Act, 16 April 2012.

<sup>98</sup> South African Schools Act 84 of 1996 (as amended) § 5(1) (S. Afr.).

<sup>99</sup> Employment of Educators Act No. 76 of 1998, § 11(e) (S. Afr.). School employees who are not educators are not subject to the procedures of this Act. However, if such an employee is accused of sexually abusing a learner, he or she will be subject to the disciplinary procedures set out in the Disciplinary Code and Procedure for Public Service (Resolution 2/99), available at <http://www.dpsa.gov.za/dpsa2g/documents/pscbc/1999/02.pdf>. See Department of Education, Generations, Part 6 of 6, at <http://www.education.gov.za/LinkClick.aspx?fileticket=0u%2BbzvvOmyw%3D&tabid=411&mid=1297> (last visited Apr. 2, 2014). Sections 3, 4.2 and Annexure A, read together, states that disciplinary action will ensue for public employees accused of sexual harassment.

<sup>100</sup> Id. § 17, 18.

<sup>101</sup> Id. § 18(1)(q) (S. Afr.).

<sup>102</sup> Id. § 18(1)(r).

<sup>103</sup> Id. § 18(1)(u).

<sup>104</sup> Id. § 17(1)(b).

<sup>105</sup> Id. § 17(1)(c).

<sup>106</sup> Id. § 17(1)(f).

<sup>107</sup> Id. at schedule 2.

<sup>108</sup> Id. at schedule 2 § 7. If the educator does not have a “valid reason” for not attending the hearing, the hearing may continue without the educator. Id.

<sup>109</sup> Employment of Educators Act No. 76 of 1998, § 17 (S. Afr.).

<sup>110</sup> Id. § 18(3). See also Department of Education, Guidelines for the Protection and Management of Sexual Violence and Harassment in Public Schools 16 (2008), available at [www.thutong.doe.gov.za/ResourceDownload.aspx?id=44563](http://www.thutong.doe.gov.za/ResourceDownload.aspx?id=44563).

<sup>111</sup> Id. § 25, Schedule 2.

<sup>112</sup> Id. § 18(3).

<sup>113</sup> South African Council for Educators Act 31 of 2000 (S. Afr.).

<sup>114</sup> Id. § 21.

<sup>115</sup> Id. § 23(1)(c).

<sup>116</sup> South African Council for Educators, Code of Professional Ethics § 3 (Conduct).

<sup>117</sup> Id. § 3.1 (Conduct).

<sup>118</sup> Id. § 3.5 (Conduct).

<sup>119</sup> Id. § 3.6 (Conduct).

<sup>120</sup> Id. at § 3.8 (Conduct).

<sup>121</sup> Id. at § 3.9 (Conduct).

<sup>122</sup> South African Council for Educators, Code of Professional Ethics, Disciplinary Procedures § 2.

<sup>123</sup> Id.

<sup>124</sup> Id. §§ 3-4, 6-9.

<sup>125</sup> See Education Labour Relations Act of 1995, Schedule 1, § 1 (S. Afr.) (defining the Education Labour Relations Council as the “council established by section 6(1) of the Education Labour Relations Act, 1993”).

<sup>126</sup> Id. § 212, Schedule 5.

<sup>127</sup> Id., Schedule 7(D)(16) (S. Afr.).

- <sup>128</sup> Education Labour Relations Council, ELRC Form E1, Part A: Referring a Dispute to the ELRC for Conciliation, Arbitration, at 1-2, <http://www.education.gov.za/LinkClick.aspx?fileticket=7Ne%2FoSLbGh4%3D&tabid=94&mid=1185> (last visited Apr. 2, 2014); see generally Constitution of the Education Labour Relations Council, Ch. 4, available at <http://www.education.gov.za/LinkClick.aspx?fileticket=LgCJZ5HYGsk%3D&tabid=390&mid=1125>.
- <sup>129</sup> Children's Act 38 of 2005, § 111 (S. Afr.).
- <sup>130</sup> Id. § 113.
- <sup>131</sup> Id. § 118.
- <sup>132</sup> Id. § 120(4)(a).
- <sup>133</sup> Id. § 123(1).
- <sup>134</sup> Service Charter for Victims of Crime in South Africa (S. Afr.).
- <sup>135</sup> Id.
- <sup>136</sup> Id.
- <sup>137</sup> Id.
- <sup>138</sup> Id.
- <sup>139</sup> Id.
- <sup>140</sup> Id. The Charter also includes the right to compensation and the right to restitution.
- <sup>141</sup> School Education Act (Gauteng) 6 of 1995 (S. Afr.).
- <sup>142</sup> Id. § 5(1)(e).
- <sup>143</sup> Id. § 5(1)(f).
- <sup>144</sup> Philander v Minister of Safety and Security (473/2011), [2013] ZANWHC 51 (6 June 2013),; F v Minister of Safety and Security and Another (CCT 30/11), [2011] ZACC 37; 2012 (1) SA 536 (CC) (15 December 2011); Minister of Safety and Security and Another v Carmichele (533/02), [2003] ZASCA 117; [2003] 4 All SA 565 (SCA) (14 November 2003), Van Eeden v Minister of Safety and Security (176/01) [2002] ZASCA 132; [2002] 4 All SA 346 (SCA) (27 September 2002).
- <sup>145</sup> S v Zothile (SS57/08), [2008] ZAGPHC 288 (12 May 2008).
- <sup>146</sup> Id. ¶ 25.3.
- <sup>147</sup> Id.
- <sup>148</sup> Id. ¶ 19.
- <sup>149</sup> Id.

## Chapter IV: Accountability in the Education System

- <sup>150</sup> Lina Mmakgabo Methi, Exploring How a School Community Copes with Violence, University of Pretoria 1, 77-78 (2010) available at <http://upetd.up.ac.za/thesis/available/etd-07082010-180040/unrestricted/dissertation.pdf>.
- <sup>151</sup> In 2009, the Department of Education was divided into two departments: the DBE and the Department of Higher Education and Training. Department of Basic Education, About DBE, <http://www.education.gov.za/TheDBE/AboutDBE/tabid/435/Default.aspx> (last visited 10 April 2014); Gabi Khumalo, Education Stakeholders Welcome Department Split, South African Government News Agency (11 May 2009), available at <http://www.education.gov.za/TheDBE/AboutDBE/tabid/435/Default.aspx>
- <sup>152</sup> Id.
- <sup>153</sup> Department of Education, The HIV/AIDS Emergency: Department of Education Guidelines for Educators (2002), available at [www.education.gov.za/LinkClick.aspx?fileticket=...tabid=95](http://www.education.gov.za/LinkClick.aspx?fileticket=...tabid=95)
- <sup>154</sup> Id.
- <sup>155</sup> Department of Education, Guidelines for the Protection and Management of Sexual Violence and Harassment in Public Schools 1 (2008), available at <http://www.thutong.doe.gov.za/ResourceDownload.aspx?id=44563>.
- <sup>156</sup> Id. at 3.
- <sup>157</sup> Id. at 4–5.
- <sup>158</sup> The procedures outline how to report, intervene, and respond to incidents of sexual violence perpetrated by both learners and educators. Id. at 7–21.
- <sup>159</sup> Susan Coetzee, Law and Policy Regulating the Management of Learner-on-Learner Sexual Misconduct in South African Public Schools, 13(1) Child Abuse Research 27–39 (2012).
- <sup>160</sup> Susan Coetzee, Law and Policy Regulating Educator-on-Learner Sexual Misconduct, 1 Stellenbosch Law Review 76, 78-82 (2012).
- <sup>161</sup> The Genderation series of booklets is available at <http://www.education.gov.za/Learners/LearnersPubs/tabid/411/Default.aspx> (last visited 12 March 2014).
- <sup>162</sup> Id.
- <sup>163</sup> Id.

- <sup>164</sup> Department of Basic Education, *Speak Out Youth Report Sexual Abuse: A Handbook for Learners on How to Prevent Sexual Abuse in Public Schools 4* (2010), available at <http://www.education.gov.za/LinkClick.aspx?fileticket=2ADgA9qwLaY%3D&tabid=93&mid=1131>.
- <sup>165</sup> *Id.* at 10–11.
- <sup>166</sup> *Id.* at 14.
- <sup>167</sup> *Id.* at 15.
- <sup>168</sup> *Id.* at 16–17.
- <sup>169</sup> *Id.* at 19.
- <sup>170</sup> Bulelwa Payi, *Now Kids can Adopt a Cop*, Mail & Guardian (5 August 1994), available at <http://mg.co.za/article/1994-08-05-now-kids-can-adopt-a-cop>
- <sup>171</sup> Lina Mmakgabo Methi, *University of Pretoria, Exploring How a School Community Copes with Violence*, Thesis for Master’s in Educational Psychology 22, 79 (2010), available at <http://upetd.up.ac.za/thesis/available/etd-07082010-180040/unrestricted/dissertation.pdf> (last visited 15 March 2014).
- <sup>172</sup> Tirisano means “working together.” See *Implementation Plan for Tirisano*, Minister of Education (January 2000–December 2004), available at <http://www.education.gov.za/LinkClick.aspx?fileticket=yUqEHW05Uuk%3D&tabid=80&mid=585>.
- <sup>173</sup> *Id.* at 7.
- <sup>174</sup> Hlayiseka Tackles Violence, Mail and Guardian (29 November 2010), available at <http://mg.co.za/article/2010-11-29-hlayiseka-tackles-violence>; see also Centre for Justice and Crime Prevention, *Hlayiseka*, available at <http://cjcp.skinthecat.co.za/?p=Hlayiseka> (last visited 10 April 2014).
- <sup>175</sup> *Id.*
- <sup>176</sup> Gauteng Department of Education, *Annual Performance Plan 2013/14* at 107, available at <http://www.education.gpg.gov.za/Document5/Documents/GDE%20APP.pdf>; see also Centre for Justice and Crime Prevention, *Hlayiseka*, available at <http://cjcp.skinthecat.co.za/?p=Hlayiseka> (last visited 10 April 2014).
- <sup>177</sup> *Safer School Complete Guide to creating and implementing a School Emergency Management Plan* (2011), available at [http://www.cso.za.org/SH-Conf-School\\_Emergency\\_Manamement\\_Plan.pdf](http://www.cso.za.org/SH-Conf-School_Emergency_Manamement_Plan.pdf) (last visited 22 March 2014).
- <sup>178</sup> *Id.* at 80.
- <sup>179</sup> *Implementation Protocol between DBE and SAPS* (January 2011), available at <http://www.education.gov.za/LinkClick.aspx?fileticket=PlbfJI%2Fo%2BbE%3D&tabid=871&mid=2455> (last visited 18 March 2014).
- <sup>180</sup> *Id.* at 2.
- <sup>181</sup> *Id.* at 5.
- <sup>182</sup> *Girls and Boys Education Movement*, available at [http://www.unicef.org/southafrica/education\\_4718.html](http://www.unicef.org/southafrica/education_4718.html) (last visited 10 April 2014); see also Department of Basic Education, *GEM/BEM on the Move*, at <http://www.education.gov.za/Home/GEMBEM/tabid/642/Default.aspx> (last visited 22 March 2013).
- <sup>183</sup> Felicia Wilson, *International Institute for Educational Planning, Gender Based Violence in South African Schools, Working Document 7* (2008), available at [http://www.iiep.unesco.org/fileadmin/user\\_upload/Research\\_Challenges\\_and\\_Trends/pdf/symposium/WilsonF.pdf](http://www.iiep.unesco.org/fileadmin/user_upload/Research_Challenges_and_Trends/pdf/symposium/WilsonF.pdf).
- <sup>184</sup> *Id.*
- <sup>185</sup> *Id.* at 10–12.
- <sup>186</sup> Created by the Presidential Job Summit in 1998, Proudly South African encourages South Africans to buy local products in order to stimulate the economy and increase jobs in South Africa. In addition to its economic stimulus mandate, the organization promotes social initiatives, such as the Ubuntu Campaign.
- <sup>187</sup> *Proudly South African Ubuntu Schools’ Campaign Against Sexual Violence and Bullying Policy*, 23 August 2012, available at <http://www.polity.org.za/article/proudly-south-african-ubuntu-schools-campaign-against-sexual-violence-and-bullying-2012-08-23>.
- <sup>188</sup> *University of South Africa, South Africa: The World’s Rape Capital*, News and Media (14 February 2013), available at <http://www.unisa.ac.za/news/index.php/2013/02/south-africa-the-worlds-rape-capital/>
- <sup>189</sup> *Lead SA* is an initiative of Primedia Broadcasting, a media group in South Africa. It is a coalition of independent newspapers that encourages South Africans to make a difference in each other’s lives, thereby changing society as a whole. *Lead SA’s* website, at <http://leadsa.co.za> (last visited 10 April 2014); see also Primedia website, at [http://www.primedia.co.za/our\\_businesses/companies/leadsa.htm](http://www.primedia.co.za/our_businesses/companies/leadsa.htm) (last visited 10 April 2014).

- <sup>190</sup> Department of Basic Education, Stop Rape Campaign, available at <http://www.education.gov.za/Home/StopRape> (last visited 22 March 2014). Campaign/tabid/849/Default.aspx.
- <sup>191</sup> The pledge reads: “I pledge: To uphold the Constitution of the Republic of South Africa. To abide by the laws of the country. To respect the rights of others irrespective of age, race, sex or sexual orientation. Not to rape or commit any form of sexual harassment, abuse or violence. To report any form of wrongdoing to authorities. To honour the responsibilities that come with these rights and to be a good citizen.” Id.
- <sup>192</sup> Interview with GDE Labour Relations official, Gauteng Province, South Africa (19 September 2013).
- <sup>193</sup> Department of Education, Guidelines for the Protection and Management of Sexual Violence and Harassment in Public Schools 17–18 (2008); see also Department of Basic Education, Speak Out Youth Report Sexual Abuse: A Handbook for Learners on How to Prevent Sexual Abuse in Public Schools 11, 19, 26, 29 (2010), available at [http://www.education.gov.za/LinkClick.aspx?fileticket=2ADgA9qw](http://www.education.gov.za/LinkClick.aspx?fileticket=2ADgA9qw;); Education Labour Relations Council Form E1: Part A: Referring a Dispute to the ELRC for Conciliation, Arbitration, and Joint Conciliation, available at <http://www.education.gov.za/LinkClick.aspx?fileticket=7Ne%2FoSLbGh4%3D&tabid=94&mid=1185>.
- <sup>194</sup> Department of Education, Guidelines for the Protection and Management of Sexual Violence and Harassment in Public Schools 17–18 (2008); see also Education Rights Project, Sexual Violence: The Rights of Learners and Educators 10, 12, 13 (2006), available at [http://www.erp.org.za/pdf/sexual%20violence%20booklet\\_WEB.pdf](http://www.erp.org.za/pdf/sexual%20violence%20booklet_WEB.pdf)
- <sup>195</sup> Susan Coetzee, Law and Policy Regulating the Management of Learner-on-Learner Sexual Misconduct in South African Public Schools, 13 Child Abuse Research in S. Afr. 27, 31 (2012).
- <sup>196</sup> Department of Basic Education, Annual Report 2011/12, 89 (2012).
- <sup>197</sup> Department of Basic Education, Educational Statistics in South Africa 2012, 23 (2014).
- <sup>198</sup> Interviews with primary school educators, Gauteng Province (19 September 2013).
- <sup>199</sup> Interviews with primary school educators, Gauteng Province (19 September 2013), see also Department of Basic Education, Annual Report 2011/12, 93 (2012).
- <sup>199</sup> Gauteng Province, Department of Basic Education, Five Year Strategic Plan 2009/10-2014/15 at 42, available at [http://www.education.gpg.gov.za/Document5/Documents/Strategic\\_plan\\_2010-2014.pdf](http://www.education.gpg.gov.za/Document5/Documents/Strategic_plan_2010-2014.pdf)
- <sup>200</sup> Interview with GDE labour relations officer, Gauteng Province, South Africa (15 August 2013).
- <sup>201</sup> Id.
- <sup>202</sup> Interview with Michael Myburgh, CEO of NAPTOSA, Houghton, Gauteng Province, South Africa (14 August 2013).
- <sup>203</sup> Interview with high school educator, Gauteng Province, South Africa (18 September 2013).
- <sup>204</sup> Id.
- <sup>205</sup> Id.
- <sup>206</sup> Interview with SACE official, Gauteng Province, South Africa (8 October 2013).; interview with GDE labour relations official, Gauteng Province, (19 September 2013).
- <sup>207</sup> Interview with GDE labour relations officer, Gauteng Province, South Africa (19 September 2013).
- <sup>208</sup> Id.
- <sup>209</sup> Id.
- <sup>210</sup> Interview with high school educator, Gauteng Province, South Africa (September 2013).
- <sup>211</sup> Interview with SACE official, Gauteng Province, South Africa (8 October 2013).
- <sup>212</sup> Id.
- <sup>213</sup> Interview with GDE labour relations officer, Gauteng Province, South Africa (19 September 2013).
- <sup>214</sup> Interview with high school educator, Gauteng Province, South Africa (September 2013); interview with high school educator, Gauteng Province, South Africa (September 2013).
- <sup>215</sup> Id.
- <sup>216</sup> Interview with SADTU official, Gauteng Province, South Africa (12 September 2013).
- <sup>217</sup> Interview with high school educators, Gauteng Province, South Africa (September 2013); interview with primary school educators, Gauteng Province, South Africa (September 2013).
- <sup>218</sup> Interview with high school educator, Gauteng Province, South Africa (September 2013).
- <sup>219</sup> Susan Coetzee, Law and Policy Regulating the Management of Learner-on-Learner Sexual Misconduct in South African Public Schools, 13 Child Abuse Research in S. Afr. 27, 32 (2012).
- <sup>220</sup> Id. at 32.
- <sup>221</sup> Id.
- <sup>222</sup> School-Based Violence Report: An Overview of School-Based Violence in South Africa, South African Council for Educators 12 (Nov. 2011), available at <http://www.sace.org.za/upload/files/School%20Based%20Violence%20Report-2011.pdf>.
- <sup>223</sup> Patrick Burton and Lezanne Leoschut, Centre for Justice and Crime Prevention, School Violence in South Africa: Results of the 2012 National School Study 43 (2013).



- <sup>224</sup> Id. at 47.
- <sup>225</sup> Id. at 43.
- <sup>226</sup> Department of Education, Guidelines for the Protection and Management of Sexual Violence and Harassment in Public Schools 14-15 (2008).
- <sup>227</sup> Id. at 17.
- <sup>228</sup> Id.
- <sup>229</sup> Interview with SGB Chairman, Gauteng Province, South Africa (20 August 2013).
- <sup>230</sup> Department of Education, Guidelines for the Protection and Management of Sexual Violence and Harassment in Public Schools 17 (2008).
- <sup>231</sup> Id. at 20.
- <sup>232</sup> Id.
- <sup>233</sup> Id.
- <sup>234</sup> Id.
- <sup>235</sup> Interview with SACE official, Gauteng Province, South Africa (8 October 2013).
- <sup>236</sup> Interview with Michael Myburgh, CEO of NAPTOSA, Gauteng Province, South Africa (14 August 2013).
- <sup>237</sup> Interview with high school principal, Gauteng Province (18 September 2013).
- <sup>238</sup> Id.
- <sup>239</sup> Interview with SACE official, Gauteng Province, South Africa (8 October 2013). The SACE official related an incident in which a principal reported the matter, and other educators and the learners burnt down the administration block of the school.
- <sup>240</sup> Interview with high school principal, Gauteng Province, South Africa (September 2013).
- <sup>241</sup> Susan Coetzee, Law and Policy on Regulating Educator-Learner Sexual Misconduct, 1 Stellenbosch Law Review 76 (2012).
- <sup>242</sup> Interview with primary school educator, Gauteng Province, South Africa (September 2013).
- <sup>243</sup> Interview with high school educator, Gauteng Province, South Africa (September 2013).
- <sup>244</sup> Interviews with high school principals, Gauteng Province, South Africa (September 2013).
- <sup>245</sup> Interview with Michael Myburgh, CEO of NAPTOSA, Houghton, Gauteng Province, South Africa (14 August 2013).
- <sup>246</sup> Interview with SACE official, Gauteng Province, South Africa (8 October 2013).
- <sup>247</sup> Interview with GDE Labour Relations Official, Gauteng Province, South Africa (19 September 2013).
- <sup>248</sup> Interview with DBE Labour Relations Official, Gauteng Province, South Africa (1 November 2013).
- <sup>249</sup> Interview with SACE Official, Gauteng Province, South Africa (8 October 2013).
- <sup>250</sup> Interview with GDE School Safety Official, Gauteng Province, South Africa (9 September 2013).
- <sup>251</sup> Interview with DBE Labour Relations Official, Gauteng Province, South Africa (1 November 2013).
- <sup>252</sup> Id. Recently, the administrative disciplinary process was consolidated into one pre-dismissal arbitration hearing precisely to avoid further learner victimisation. See Mandy Wiener “Fired Teacher Gave Pupils ‘Penis Pasta’”, IOL News (30 October 2013), available at <http://www.iol.co.za/news/crime-courts/fired-teacher-gave-pupils-penis-pasta-1.1599579>
- <sup>253</sup> GDE Labour Relations Officers Forum, Matthew Goniwe High School, 24 September 2013.
- <sup>254</sup> Id.
- <sup>255</sup> A modest increase in membership fees (currently R10 per month for public school educators and R120 per educator per annum for private institutions) may be one way to raise additional resources that would enable SACE to conduct efficient and effective investigations. See South African Council for Educators, Frequently Asked Questions, at [http://www.sace.org.za/Registration/jit\\_default\\_17.Registration-FAQ.html](http://www.sace.org.za/Registration/jit_default_17.Registration-FAQ.html) (last visited 24 April 2014).
- <sup>256</sup> Interview with DBE Labour Relations Unit, Gauteng Province, South Africa (1 November 2013).
- <sup>257</sup> ‘Minutes from the National Register for Sex Offenders dialogue’, held at SACE Chambers, Centurion, Gauteng (18 July 2013) (on file with authors); see also Interview with GDE Labour Relations Official, Gauteng Province, South Africa (19 September 2013).
- <sup>258</sup> Id.
- <sup>259</sup> Id.
- <sup>260</sup> Id.
- <sup>261</sup> Interview with DBE Labour Relations Unit, Gauteng Province, South Africa (1 November 2013).
- <sup>262</sup> Interview with Union officials, Gauteng Province South Africa (12 September 2013 and 10 October 2013) ; Interview with DBE Labour Relations Unit, Gauteng Province, South Africa (1 November 2013)
- <sup>263</sup> Interview with Education Labour Relations Council official, Gauteng Province, South Africa (17 September 2013).

- <sup>264</sup> On occasion of an alleged rape of a 13-year old learner by her principal in 2012, SADTU's General Secretary, Mugwena Maluleke said: "Sexual assault imposed on students deserves our urgent attention and action; those who are found guilty of sexual abuse should receive the harshest sentence for their crime." South African Democratic Teachers Union, Statement issued by SADTU Secretariat, at <http://www.sadtu.org.za/show.php?id=2775> (last visited 22 March 2013).
- <sup>265</sup> Interview with SADTU official, Gauteng Province, South Africa (12 September 2013).
- <sup>266</sup> Interview with Shaheda Omar, Director of Teddy Bear Clinic, Parktown, Gauteng Province, South Africa (30 October 2013).
- <sup>267</sup> Interview with Michael Myburgh, NAPTOSA, CEO of NAPTOSA, Houghton, Gauteng Province, South Africa (14 August 2013).
- <sup>268</sup> Interview with SADTU official, Gauteng Province, South Africa (12 September 2013).
- <sup>269</sup> Interview with Michael Myburgh, CEO of NAPTOSA, Houghton, Gauteng Province, South Africa (14 August 2013).
- <sup>270</sup> Interview with SACE official, Gauteng Province, South Africa (8 October 2013).
- <sup>271</sup> Interview with DBE Labour Relations Official, Gauteng Province, South Africa (1 November 2013).
- <sup>272</sup> Interview with GDE Labour Relations official, Gauteng Province, South Africa (19 September 2013).
- <sup>273</sup> Interview with Michael Myburgh, CEO of NAPTOSA, Houghton, Gauteng Province, South Africa (14 August 2013); interview with SACE official, Gauteng Province, South Africa (8 October 2013).
- <sup>274</sup> Interview with SACE Official, Gauteng Province, South Africa (8 October 2013).
- <sup>275</sup> *Id.*
- <sup>276</sup> Interview with Matakanya Matakanya, NASGB official, Johannesburg, Gauteng Province, South Africa (6 September 2013).
- <sup>277</sup> *Id.*
- <sup>278</sup> Interview with SACE official, Gauteng Province, South Africa (8 October 2013).
- <sup>279</sup> *Id.*
- <sup>280</sup> *Id.*
- <sup>281</sup> Employment of Educators Act No. 76 of 1998, § 25, Schedule 2 (S. Afr.); South African Council for Educators, Code of Professional Ethics, Disciplinary Procedures §§ 9–10.
- <sup>282</sup> Education Labour Relations Council, ELRC Form E1, Part A: Referring a Dispute to the ELRC for Conciliation, Arbitration, at 1-2, <http://www.education.gov.za/LinkClick.aspx?fileticket=7Ne%2FoSLbGh4%3D&tabid=94&mid=1185> (last visited Apr. 2, 2014); see generally Constitution of the Education Labour Relations Council, Ch. 4, available at <http://www.education.gov.za/LinkClick.aspx?fileticket=LgCJZ5HYGsk%3D&tabid=390&mid=1125>.
- <sup>283</sup> See discussion at *infra* Part IV.B.4.
- <sup>284</sup> South African Council for Educators, School-Based Violence Report: An Overview of School-Based Violence in South Africa 1, 13 (2011).
- <sup>285</sup> South African Council for Educators (SACE), Report on Disciplinary Cases Referred to the South African Council for Educators in 2008 and 2009 and their Policy Implications in the Context of International Professional Practice 8 (2012).
- <sup>286</sup> *Id.* at 8–9.
- <sup>287</sup> *Id.* at 10.
- <sup>288</sup> Another source for statistics on complaints of sexual harassment among staff would be the Commission for Conciliation, Mediation and Arbitration. But the Commission "does not keep separate statistics for sexual harassment cases. Such statistics merely form part of the larger category of unfair dismissals." Denine Smit & Voet du Plessis, Harassment in the Education Sector, [2011] PER 36.
- <sup>289</sup> South African Council for Educators (SACE), Annual Report 2011-2012 26, 31 (2012).
- <sup>290</sup> *Id.* at 26, 31.
- <sup>291</sup> *Id.* at 31.
- <sup>292</sup> *Id.* at 15. Educators may seek dispute resolution from the Education Labour Relation Council (ELRC) where disciplinary hearings result in educator dismissal. In 2011/12, nine percent of the 157 dismissal disputes referred to the ELRC were related to the abuse of learners. Of the fourteen cases referred to the Council in 2010/11, nine cases were finalised and five cases had continued into 2011/12. A total of six new cases had been referred to the Council in 2011/12. The Council is currently handling twelve cases related to sexual harassment. <http://www.pmg.org.za/report/20111013-annual-report-briefing-education-labour-relations-council-elrc>.
- <sup>293</sup> South African Council for Educators (SACE), Annual Report 2011-2012, 15 (2012).
- <sup>294</sup> South African Council for Educators (SACE), Report on Disciplinary Cases Referred to the South African Council for Educators in 2008 and 2009 and their Policy Implications in the Context of International Professional Practice 12 (2012).
- <sup>295</sup> *Id.* at 31.



- <sup>296</sup> Gauteng Province, Department of Basic Education, Annual Report 2010/11 86 (2011).
- <sup>297</sup> Gauteng Province, Department of Basic Education, Annual Report 2011/12 94 (2012).
- <sup>298</sup> Interview with GDE Labour Relations official, Gauteng Province, South Africa (19 September 2013).
- <sup>299</sup> Interview with Education Labour Relations Council official, Gauteng Province, South Africa (17 September 2013).
- <sup>300</sup> Employment of Educators Act No. 76 of 1998 § 17(1)(c) (S. Afr.).
- <sup>301</sup> South African Council for Educators, Code of Professional Ethics § 3.9.
- <sup>302</sup> Employment of Educators Act No. 76 of 1998 §§ 17 and 18.
- <sup>303</sup> Susan Coetzee, Law and Policy on Regulating Educator-Learner Sexual Misconduct, 1 Stellenbosch Law Review 82 (2012).
- <sup>304</sup> Id. at 82-83.
- <sup>305</sup> Interview with SACE Official, Gauteng Province, South Africa (June 2014).
- <sup>306</sup> Employment of Educators Act No. 76 of 1998, schedule 2.
- <sup>307</sup> Interview with DBE School Governance Official, Gauteng Province, South Africa (1 November 2013); Interview with SACE Official, Gauteng Province, South Africa (8 October 2013).
- <sup>308</sup> Id. at 83.
- <sup>309</sup> Id.
- <sup>310</sup> Id.
- <sup>311</sup> Interview with Matakantya Matakanya, President NASGB, Gauteng Province, South Africa (6 September 2013).

## Chapter V: Accountability in the Criminal Justice System

- <sup>312</sup> See generally Section 27, Government Failure to Protect Learners From Sexual Abuse in Schools (24 May 2012), available at <http://www.section27.org.za/2012/05/24/government-failure-to-protect-learners-from-sexual-abuse-in-schools/>; Human Rights Watch, Deadly Delay: South Africa's Efforts to Prevent HIV in Survivors of Sexual Violence Prosecution of Sexual Offence Cases (2004), available at <http://www.hrw.org/reports/2004/southafrica0304/6.htm>
- <sup>313</sup> See generally Lisa Vetten, Will Any Police Officer Do? The Organization of the South African Police Service's (SAPS) Response to Sexual Offences 1 (June 2012), available at [http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS\\_response\\_to\\_sexual\\_offences.pdf](http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS_response_to_sexual_offences.pdf). The FCS Units replaced South Africa's specialised Child Protection Units, which had been created in 1986. Id.
- <sup>314</sup> Id. at 1, 5; Cheryl Frank and Samantha Waterhouse, One Step Forward, Two Steps Back? The Impact of SAPS Restructuring of the FCS Unit, 28 S. Afr. Crime Quarterly 25, 25 (June 2009), available at <http://www.issafrica.org/uploads/CQ28FRANK.PDF>. The National Commissioner also reduced the length of training for new officers from two years to one. Interview with Gareth Newham, Head of the Governance, Crime, and Justice Division, Institute for Security Studies, Melville, Gauteng Province, South Africa (12 August 2013).
- <sup>315</sup> Lisa Vetten, Will Any Police Officer Do? The Organisation of the South African Police Service's (SAPS) Response to Sexual Offences 1 (June 2012), available at [http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS\\_response\\_to\\_sexual\\_offences.pdf](http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS_response_to_sexual_offences.pdf).
- <sup>316</sup> Id. at 4-5.
- <sup>317</sup> Interview with Senior SAPS officer, Gauteng Province, South Africa (23 August 2013).
- <sup>318</sup> Id.
- <sup>319</sup> South African Police Service Act, § 40, 1995; Regulations for the South African Police Service, Schedule: The South African Police Service Discipline Regulations 2006, § 20.
- <sup>320</sup> South African Police Service Act, § 40, 1995; Regulations for the South African Police Service, Schedule: The South African Police Service Discipline Regulations 2006, § 20.
- <sup>321</sup> National Instruction 3/2008: Sexual Offences, § 5(3)-(4). The National Instruction was issued pursuant to South Africa's Sexual Offences Act to regulate the actions of the police in investigating sexual offences and providing assistance to victims. Id. § 1.
- <sup>322</sup> Regulations for the South African Police Service, Schedule: The South African Police Service Discipline Regulations 2006, §§ 8-15.
- <sup>323</sup> Gareth Newham, Head of the Governance, Crime, and Justice Division, Institute for Security Studies, Johannesburg, South Africa (12 August 2013).
- <sup>324</sup> Civilian Secretariat for the Police Act, 2011.
- <sup>325</sup> Id. § 6(1)(i)-(j).
- <sup>326</sup> The Independent Police Investigative Directorate, (IPID) is required to investigate complaints of police misconduct, including rape or assault by a police officer. IPID § 28(1). It is permitted to investigate corruption matters within the police or any other matter referred to it as a result of a decision by the IPID Executive Director or at the request of the Minister of Justice, an MEC, or Secretary of Police. Id. § 28(1)(h), (2)(b) However, absent

a discretionary referral by one of these officials, the failure of police officers to protect learners from and provide them with redress for educator-perpetrated sexual abuse will not fall under the current jurisdiction of the Directorate.

<sup>327</sup> See supra Part III(C)(4).

<sup>328</sup> Domestic Violence Act, § 18(1) (a), 2011 (as amended by Independent Police Investigative Directorate Act, Schedule 1, 2011).

<sup>329</sup> Id. § 18(1) (b). The Secretariat must report to Parliament on the number of and particulars of noncompliance reports received and recommendations made, and the National Commissioner of SAPS must report on measures taken in response to the Secretariat's recommendations. Id.

<sup>330</sup> Minister of Police and Others v Premier of the Western Cape and Others (CCT 13/13) [2013] ZACC 33; 2013 (12) BCLR 1365 (CC) (1 October 2013).

<sup>331</sup> Id. ¶ 32.

<sup>332</sup> Id. (citing S. Afr. Const. § 206(3) (1996)). In early 2014, the Commission held a series of public hearings, which included testimony on police handling of numerous sexual violence cases. For example, the Principal Medical Officer at a Thuthuzela Centre spoke of police officers who had left boxes of rape kit forensic evidence behind in a field and lengthy delays in investigating the case of a serial child rapist. Kate Stegeman, Bribes and Bungled Rape, Murder Cases: Kheylitsha Police Under Fire, Daily Maverick, 3 February 2014.

<sup>333</sup> Gareth Newham, Head of the Governance, Crime and Justice Division of the Institute for Security Studies, noted that "sexual violence statistics with the police are not even vaguely reliable because many victims are not reporting." Interview with Gareth Newham, Head of the Governance, Crime, and Justice Division, Institute for Security Studies, Melville, Gauteng Province, South Africa (12 August 2013). See also Emily Keehn, Lara Stemple, Cherith Sanger, Dean Peacock, Uneven and Still Insufficient: South African Police Services' Station-Level Compliance With Sexual Offences Laws, 8 Feminist Criminology 1, 5-6 (2013).

<sup>334</sup> Interview with Thsobo and Maraja, Community Members, Hillbrow, Gauteng Province, South Africa (14 August 2013).

<sup>335</sup> Id.

<sup>336</sup> Interview with Officer Kaiser Mbele, Benoni Police Station, Benoni, Gauteng Province, South Africa (20 August 2013).

<sup>337</sup> Interview with Senior SAPS officer, Gauteng Province, South Africa (23 August 2013)

<sup>338</sup> Interview with Thsobo and Maraja, Community Members, Hillbrow, Gauteng Province, South Africa (14 August 2013).

<sup>339</sup> Id.

<sup>340</sup> Id.

<sup>341</sup> Interview with Gareth Newham, Head of the Governance, Crime, and Justice Division, Institute for Security Studies, Melville, Gauteng Province, South Africa (12 August 2013).

<sup>342</sup> Interview with Senior SAPS Officer, Gauteng Province, South Africa (23 August 2013).

<sup>343</sup> Id. See generally Lisa Vetten, Will Any Police Officer Do? The Organisation of the South African Police Service's (SAPS) Response to Sexual Offences\_ (June 2012), available at [http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS\\_response\\_to\\_sexual\\_offences.pdf](http://www.tlac.org.za/wp-content/uploads/2012/01/TLAC-Policy-Brief-4.SAPS_response_to_sexual_offences.pdf).

<sup>344</sup> Interview with Officer Kaiser Mbele, Benoni FCS Unit, Benoni, South Africa (20 August 2013).

<sup>345</sup> Id.

<sup>346</sup> Email from Shaheeda Omar, Director of the Teddy Bear Clinic, to Meetali Jain, Senior Researcher, Centre for Applied Legal Studies, 22 April 2014 (on file with authors).

<sup>347</sup> Id.

<sup>348</sup> Id.

<sup>349</sup> Interview with Gareth Newham, Head of the Governance, Crime, and Justice Division, Institute for Security Studies, Melville, Gauteng Province, South Africa (12 August 2013). See also Bulelwa Payi, Now Kids Can Adopt a Cop (Aug. 5, 1994), available at <http://mg.co.za/article/1994-08-05-now-kids-can-adopt-a-cop/>

<sup>350</sup> National Prosecuting Authority of South Africa, <http://www.npa.gov.za/ReadContent412.aspx> (last visited 9 March 2014).

<sup>351</sup> Id.

<sup>352</sup> Id.

<sup>353</sup> Interviews with Prosecutor, Gauteng Province (16 August 2013); Interview with a Captain from SAPS, a Colonel from SAPS, and a representative from the Teddy Bear Clinic, Gauteng Province (30 October 2013).

<sup>354</sup> Id.

<sup>355</sup> Jean Redpath, Instit. for Sec. Studies, Failing to Prosecute? Assessing the state of the National Prosecuting Authority in South Africa 41-3 (2012), available at <http://www.issafrica.org/uploads/Mono186WEB.pdf>.

<sup>356</sup> Id.

<sup>357</sup> See South African Law Comm'n, Issue Paper 10, Sexual Offences Against Children § 5.8.3 (1997).

<sup>358</sup> Jean Redpath, Instit. for Sec. Studies, *Failing to Prosecute? Assessing the state of the National Prosecuting Authority in South Africa* 41-3 (2012), available at <http://www.issafrica.org/uploads/Mono186WEB.pdf>. In November 2013, the Supreme Court of Appeal found that the NPA's discretion to determine whether or not to pursue the investigation and potential prosecution of a case is not absolute. It held that the NPA was required to initiate an investigation into crimes against humanity allegedly committed by Zimbabwean police and officials against Zimbabwean citizens in Zimbabwe under the domestic act that implemented the Implementation of the Rome Statute of the International Criminal Court Act. *National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* (485/2012) [2013] ZASCA 168 (27 November 2013), ¶ 39. The case is currently on appeal to the Constitutional Court. *National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Another*, Case CCT 02/14, Directions Dated 3 February 2014.

<sup>359</sup> Interview with Senior SAPS Officer, Gauteng Province, South Africa (23 August 2013).

<sup>360</sup> Id.

<sup>361</sup> Interview with a Prosecutor, Gauteng Province (16 August 2013); Interview with a Captain from SAPS, Colonel from SAPS, and a representative from the Teddy Bear Clinic, Gauteng Province (30 October 2013).

<sup>362</sup> Id.

<sup>363</sup> Interview with Officer Kaiser Mbele, Benoni FCS Unit, Benoni, South Africa (20 August 2013).

<sup>364</sup> Email from Shaheeda Omar, Director of the Teddy Bear Clinic, to Meetali Jain, Senior Researcher, Centre for Applied Legal Studies, 22 April 2014 (on file with authors).

<sup>365</sup> Interview with Prosecutor, Gauteng Province, South Africa (16 August 2013); Interview with a Captain from SAPS, a Colonel from SAPS and a representative from the Teddy Bear Clinic, Gauteng Province (30 October 2013).

<sup>366</sup> Id.

<sup>367</sup> Id. Interview with Magistrate, Kempton Park, Gauteng Province, South Africa (22 August 2013).

<sup>368</sup> Interview with Prosecutor, Gauteng Province, South Africa (16 August 2013); Interview with a Captain from SAPS, a Colonel from SAPS and a representative from the Teddy Bear Clinic, Gauteng Province (30 October 2013). The Prosecutor noted that some parents fail to bring their child in for court preparation with prosecutors and intermediaries and suggested that parents be educated to the fact that once an arrest is made, it is not their choice as to whether a case should proceed. Id. Of course, another possible explanation for a parent's failure to follow the investigation processes is his or her inability to miss work to bring the child in. Id.

<sup>369</sup> Id.

<sup>370</sup> See Aartie J. Narsee, *Like Being Raped All Over Again*, Times Live (22 January 2014); M.J. Ntlatleng, *Circumstances that Influence the Finalisation of Child Sexual Abuse Cases in Tembisa* 4. 16-17 (November 2011) (unpublished M.A. thesis, North-West University) (on file with the South African National Research Foundation). For example, magistrates have reportedly engaged in hostile questioning of child victims of sex abuse and drawn unwarranted conclusions based on the victim's relationship to the accused, sexual history, and presence or absence of bodily injuries, in spite of a law that prohibits adjudicators from considering these issues. Aartie J. Narsee, *Like Being Raped All Over Again*, Times Live (22 January 2014).

<sup>371</sup> Interview with Nikki Stein, attorney, and Ariane Nevin, legal fellow, Section 27, Braamfontein, Gauteng Province, South Africa (21 August 2013).

<sup>372</sup> Id.

<sup>373</sup> Id.

<sup>374</sup> Email from Shaheeda Omar, Director of the Teddy Bear Clinic, to Meetali Jain, Senior Researcher, Centre for Applied Legal Studies, 22 April 2014 (on file with authors).

<sup>375</sup> Criminal Procedure Act §§ 161 (2), 170 A(1), 170 A(2) (a).

<sup>376</sup> Gert Jonker & Rika Swanzen, *Intermediary Services for Child Witnesses Testifying in South African Criminal Courts*, 4(6) Sur, Int'l J. on Hu. Rts. 91, 95 (2007).

<sup>377</sup> Interview with Magistrate, Kempton Park, Gauteng Province, South Africa (22 August 2013).

<sup>378</sup> Interview with Elizabeth Steenkamp, Chief Social Worker at the iThemba Rape and Trauma Centre, Benoni, Gauteng Province, South Africa (20 August 2013).

<sup>379</sup> Gert Jonker & Rika Swanzen, *Intermediary Services for Child Witnesses Testifying in South African Criminal Courts*, 6 INT'L J. OF HUM. RTS. 91, 110 (2007), available at <http://www.surjournal.org/eng/index6.php>

<sup>380</sup> See Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, *Report on the Re-establishment of Sexual Offences Courts* 24, 33 (August 2013), available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.

<sup>381</sup> Id.

<sup>382</sup> Email from Shaheeda Omar, Director of the Teddy Bear Clinic, to Meetali Jain, Senior Researcher, Centre for Applied Legal Studies, 22 April 2014 (on file with authors).

<sup>383</sup> Id. at 22-28.

<sup>384</sup> Id. at 27.

<sup>385</sup> Interview with Senior SAPS Officer, Gauteng Province, South Africa (23 August 2013) (“If an FCS case goes to a general court, that court is not as sensitive to the nature of sexual offense cases.”).

<sup>386</sup> See Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, Report on the Re-establishment of Sexual Offences Courts (August 2013), available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.

<sup>387</sup> NPA (National Prosecuting Authority) and DOJ&CD (Department of Justice and Constitutional Development), National Strategy for the Roll-Out of Specialised Sexual Offences Courts (2003).

<sup>388</sup> See Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, Report on the Re-establishment of Sexual Offences Courts 25 (August 2013), available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.

<sup>389</sup> Id.

<sup>390</sup> Id. at 18.

<sup>391</sup> Interview with Magistrate, Kempton Park, Gauteng Province, South Africa (22 August 2013).

<sup>392</sup> See Department of Justice and Constitutional Development, Media Statement, Justice in Action as Minister Radebe launches the Butterworth Sexual Offences Court, Eastern Cape (23 August 2014), available at [http://www.justice.gov.za/m\\_statements/2013/20130823-sxoc-butterworth.html](http://www.justice.gov.za/m_statements/2013/20130823-sxoc-butterworth.html).

<sup>393</sup> Id.

<sup>394</sup> Office of the Chief Justice, Media Release, Training for Magistrates on the Sexual Offences and Child Justice Acts (13 March 2013), available at <http://constitutionallyspeaking.co.za/training-for-magistrates-on-sexual-offences-and-child-justice-acts>. “Judicial Officers attending this week’s training workshop will be appraised on developments on the Sexual Offences Courts; judicial case management of sexual offenses and guidelines on case-flow management; best practices in dealing with child witnesses and intermediaries and dealing with various evidential aspects in sexual offenses.” Id.

<sup>395</sup> Aarti J. Narsee, Sex Cases “Take Toll on Officials,” Times Live (7 August, 2013), available at <http://www.timeslive.co.za/thetimes/2013/08/07/sex-cases-take-toll-on-officials>.

<sup>396</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, §§ 40-53 (S. Afr.).

<sup>397</sup> Children’s Act 38 of 2005, Part A, Chapter 7, §§ 111-128.

<sup>398</sup> Department of Justice and Constitutional Development, FAQ: National Register for Sex Offenders (NRSO), at <http://www.justice.gov.za/vg/nrso.html> (last visited 22 March 2014).

<sup>399</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, § 43. The register also includes the names of certain individuals alleged to have committed a sexual offense against a child or mentally disabled person where the court, in light of the accused person’s mental illness or intellectual disability and where necessary to protect the public interest, has ordered that he or she be detained in prison, a psychiatric hospital or other mental health institution. Id. § 43(a)(ii) (referring to §§ 77(6) and 78(6) of the Criminal Procedure Act).

<sup>400</sup> Unauthorised disclosure of any of the information contained in the register is a criminal offence. Department of Justice website, available at <http://www.justice.gov.za/vg/nrso.html>, Q7

<sup>401</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, §§ 41 and 44.

<sup>402</sup> Id.

<sup>403</sup> Id.

<sup>404</sup> Interview with DOJCD official, Tshwane (Sept. 12 2013).

<sup>405</sup> Interview with Matakanya Matakanya, NASGB, Gauteng Province, South Africa (6 September 2013). The requirement for application of a certificate can lead to an impediment in accountability because a SGB does not have access to information contained on the register, as it is not an employer.

<sup>406</sup> This representation was made by the Department of Justice spokesperson in the course of a Constitutional Court hearing examining whether discretion must be afforded to courts in determining whether to place a child offender on the register. “Court hears case made on behalf of child sex offenders,” BD Live (7 Feb. 2014), available at <http://www.bdlive.co.za/national/2014/02/07/court-hears-case-made-on-behalf-of-child-sex-offenders>.

<sup>407</sup> The DOJ&CD recruited these data capturers and trained them to review court records. Each data capturer is provided with standardised forms to complete in order to ensure that there is uniformity of information captured for each case and in each region. Interview with DOJ&CD official, Tshwane, Gauteng Province, South Africa (12 September 2013).

<sup>408</sup> Id.

<sup>409</sup> Id.

<sup>410</sup> Sloth-Nielsen, Protection of Children, in C.J. Davel and A. Skelton (eds) Commentary on the Children’s Act 7-9 (Davel and Skelton, eds., 2007).

<sup>411</sup> Children’s Act 38 of 2005, § 113.

<sup>412</sup> Id. § 115(b) designated child protection organisations;  
(c) a member of the unit of the South African Police Service tasked with child protection; or  
(d) any other person for the purpose of conducting research on child abuse or deliberate neglect or related issues’  
<sup>413</sup> Children’s Act § 113  
<sup>414</sup> Id.  
<sup>415</sup> Id. § 118  
<sup>416</sup> Id. § 126(1)(a). The school may verify a person’s Part B status by contacting the Director-General, who has access to Part B of the Register. Id. at § 126(4).  
<sup>417</sup> Id. § 123(2).  
<sup>418</sup> Interview with DOJ&CD official, Tshwane, Gauteng Province, South Africa (12 September 2013).  
<sup>419</sup> Id.

## Chapter VI: Accountability in the Provision of Victim and Survivor Services

<sup>420</sup> Shahnaaz Suffla et al., A Qualitative Evaluation of Medico-Legal Services in Gauteng Province, South Africa: Service Accessibility and Quality of Care to Rape Survivors, 1, 1 Afr. Safety Promotion 24 (2002).  
<sup>421</sup> Id.  
<sup>422</sup> Training Resources Group and Play Therapy Africa, Strengthening Child Protection Systems in Sub-Saharan Africa 52 (Prepared for the Inter-Agency Group on Child Protection Systems in Sub-Saharan Africa, Working Paper, 2012), available at [http://www.unicef.org/wcaro/english/strengthening\\_child\\_protection\\_systems\\_in\\_sub-Saharan\\_Africa\\_-\\_August\\_2012\\_.pdf](http://www.unicef.org/wcaro/english/strengthening_child_protection_systems_in_sub-Saharan_Africa_-_August_2012_.pdf).  
<sup>423</sup> National Prosecuting Authority of South Africa, Thuthuzela Care Centre: Turning Victims into Survivors 8 (n.d.), available at <http://www.npa.gov.za/UploadedFiles/THUTHUZELA%20Brochure%20New.pdf>  
<sup>424</sup> Id. at 3.  
<sup>425</sup> Id. at 7.  
<sup>426</sup> See, e.g., UN Women, Thuthuzela Care Centres in South Africa, at <http://progress.unwomen.org/thuthuzela-care-centres-in-south-africa/> (last visited 21 March 2014).  
<sup>427</sup> See Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, Report on the Re-establishment of Sexual Offences Courts 33 (August 2013), available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.  
<sup>428</sup> Interview with Dr. M. Barbar and Dr. A. Sharif, Medico-Legal Clinic, Hillbrow, Gauteng Province, South Africa (15 August 2013).  
<sup>429</sup> Id.  
<sup>430</sup> Id.  
<sup>431</sup> Shahnaaz Suffla et al., A Qualitative Evaluation of Medico-Legal Services in Gauteng Province, South Africa: Service Accessibility and Quality of Care to Rape Survivors, 1, 1 Afr. Safety Promotion 24, 34 (2002).  
<sup>431</sup> Interview with Elizabeth Steenkamp, Chief Social Worker at the iThemba Rape and Trauma Centre, Benoni, Gauteng Province, South Africa (20 August 2013).  
<sup>432</sup> Id.  
<sup>433</sup> Id.; iThemba Rape and Trauma Support Centre, Who We Are, <http://www.traumasupport.org.za/index.php/about-us/who-we-are> (last visited 9 March 2014); interview with Shaheda Omar, Director, Teddy Bear Clinic, Gauteng Province, South Africa (30 October 2013).  
<sup>434</sup> See Kidz Clinic for Abused Children, at [http://www.wmaca.org.za/index.php?level=wmaca\\_top1\\_content&pageid=2](http://www.wmaca.org.za/index.php?level=wmaca_top1_content&pageid=2) (last visited 4 March 2014).  
<sup>435</sup> See, e.g., Kidz Clinic for Abused Children, at [http://www.wmaca.org.za/index.php?level=wmaca\\_top1\\_content&pageid=2](http://www.wmaca.org.za/index.php?level=wmaca_top1_content&pageid=2) (last visited 4 March 2014).  
<sup>436</sup> Elizabeth Steenkamp, Chief Social Worker at the iThemba Rape and Trauma Centre, Benoni, Gauteng Province, South Africa (20 August 2013).  
<sup>437</sup> Id.  
<sup>438</sup> Id.  
<sup>439</sup> See, e.g., Interview with Dr. M. Barbar and Dr. A. Sharif, Medico-Legal Clinic, Hillbrow, Gauteng Province, South Africa (15 August 2013); Kidz Clinic for Abused Children, at [http://www.wmaca.org.za/index.php?level=wmaca\\_top1\\_content&pageid=2](http://www.wmaca.org.za/index.php?level=wmaca_top1_content&pageid=2) (last visited 4 March 2014).  
<sup>440</sup> Kidz Clinic for Abused Children, at [http://www.wmaca.org.za/index.php?level=wmaca\\_top1\\_content&pageid=2](http://www.wmaca.org.za/index.php?level=wmaca_top1_content&pageid=2) (last visited 4 March 2014).  
<sup>441</sup> See id.  
<sup>442</sup> Id.  
<sup>443</sup> Interview with Gauteng Department of Education official, Gauteng Province, South Africa (9 September 2013).  
<sup>444</sup> Id.



<sup>445</sup> Id. (noting, for example, that social workers should be available to provide psychosocial support to learners in every school).

<sup>446</sup> Interview with Joan van Niekerk, Childline, Rosebank, Gauteng Province, South Africa (21 August 2013).

<sup>447</sup> Although their current data collection system does not have the capacity to analyse the details of every call the organisation receive, they soon hope to be able to code each report with details such as the age and gender of the child, the identity of the abuser, and the location of the abuse. Id.

<sup>448</sup> Id.

<sup>449</sup> Elizabeth Steenkamp, Chief Social Worker at the iThemba Rape and Trauma Centre, Benoni, Gauteng Province, South Africa (20 August 2013).

<sup>450</sup> Id.

<sup>451</sup> Id. Social workers also produce progress reports and submit monthly statistics to the Department of Social Development. Id.

<sup>452</sup> The recent re-establishment of the Sexual Offences Courts, if implemented effectively, may help to address many of these concerns.

<sup>453</sup> Interview with Joan van Niekerk, Childline, Rosebank, Gauteng Province, South Africa (21 August 2013).

<sup>454</sup> See, e.g., id.

<sup>455</sup> Id.

<sup>456</sup> Interview with Nikki Stein, attorney, and Ariane Nevin, legal fellow, Section 27, Braamfontein, Gauteng Province, South Africa (21 August 2013).

<sup>457</sup> Lawyers Against Abuse seeks to provide direct legal services to victims of gender-based violence. They facilitate relationships with other agencies and support services, such as the SAPS, counsellors, medical clinics, etc. Their goal in creating this network is to make it as easy as possible for victims to obtain all the necessary support smoothly.

<sup>458</sup> Interview with Nikki Stein, attorney, and Ariane Nevin, legal fellow, Section 27, Braamfontein, Gauteng Province, South Africa (21 August 2013).

<sup>459</sup> Interview with Joan van Niekerk, Childline Rosebank, Gauteng Province, South Africa (22 August 2013); Email from Shaheeda Omar, Director of the Teddy Bear Clinic, to Meetali Jain, Senior Researcher, Centre for Applied Legal Studies, 22 April 2014 (on file with authors).

<sup>460</sup> Email from Ann Skelton, Professor and Director of the Centre for Child Law, University of Pretoria, to Meetali Jain, Senior Researcher, Centre for Applied Legal Studies, 22 April 2014 (on file with authors).

<sup>461</sup> Interview with Elizabeth Steenkamp, Chief Social Worker at the iThemba Rape and Trauma Centre, Benoni, Gauteng Province, South Africa (20 August 2013). Ms. Steenkamp finds it especially difficult to find staff with forensic knowledge, a basic requirement for working with child victims of sexual abuse. Id.

<sup>462</sup> Id.

<sup>463</sup> See, e.g., Interview with Joan van Niekerk, Childline Rosebank, Gauteng Province, South Africa (22 August 2013).

<sup>464</sup> Id.

<sup>465</sup> Interview with Elizabeth Steenkamp, Chief Social Worker at the iThemba Rape and Trauma Centre, Benoni, Gauteng Province, South Africa (20 August 2013).

<sup>466</sup> Id.

<sup>467</sup> Interview with Gauteng Department of Education official, Gauteng Province, South Africa (9 September 2013).

<sup>468</sup> See Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, Report on the Re-establishment of Sexual Offences Courts 34 (August 2013), available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.

<sup>469</sup> This responsibility may be particularly weighty in the context of educator-learner violence, which is perpetrated by government actors in government institutions that are charged with keeping learners safe.

<sup>470</sup> Id. at 13.

## Chapter VII: Accountability and South Africa's Chapter Nine Institutions

<sup>471</sup> Southern African Catholic Bishops' Conference Parliamentary Liaison Office, The Chapter 9 Institutions in South Africa, Briefing Paper 287 (April 2012), available at <http://m.polity.org.za/article/the-chapter-9-institutions-in-south-africa-april-2012-2012-04-26>.

<sup>472</sup> Id. at 4.

<sup>473</sup> Id.

<sup>474</sup> Pierre de Vos, Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy, in *Accountable Government in Africa* 173 (D.M. Chirwa and L. Nijzink, eds., (2011), available at

[http://www.academia.edu/3005430/Balancing\\_Independence\\_and\\_Accountability\\_The\\_Role\\_of\\_of\\_Chapter\\_9\\_Institutions\\_in\\_South\\_Africas\\_Constitutional\\_Democracy](http://www.academia.edu/3005430/Balancing_Independence_and_Accountability_The_Role_of_of_Chapter_9_Institutions_in_South_Africas_Constitutional_Democracy).

<sup>475</sup> Public Protector, South Africa, Public Protector Triggers Sacking of Sexual Assault Convict at KZN School (12 March 2012), available at [www.pprotect.org/media\\_gallery/2013/12032013.asp](http://www.pprotect.org/media_gallery/2013/12032013.asp).

<sup>476</sup> Id.

<sup>477</sup> Id.

<sup>478</sup> Id.

<sup>479</sup> Id.

<sup>480</sup> Id.

<sup>481</sup> South African Human Rights Commission Act 40, 2013, Preamble.

<sup>482</sup> South African Human Rights Commission, Report of the Public Hearing on School-Based Violence (2006), available at <http://www.sahrc.org.za/home/index.php?ipkContentID=15> (click on “Inquiry into School Based Violence in South Africa 2006”).

<sup>483</sup> Id. at 1.

<sup>484</sup> Id. at 11–12.

<sup>485</sup> Id. at 12.

<sup>486</sup> Id. at 32–39.

<sup>487</sup> Id. at 11.

<sup>488</sup> Id.

<sup>489</sup> South African Human Rights Commission Annual Report 2013, part B page 9.

<sup>490</sup> South African Human Rights Commission, SAHRC Makes Finding in the National Child Protection Register Complaint, Press Release, 16 October 2013, available at: <http://www.sahrc.org.za/home/index.php?ipkArticleID=245>.

<sup>491</sup> Id.

<sup>492</sup> South African Human Rights Commission Report, Mike Waters MP v Department of Social Development, Closing Report GP/2012/309, ¶¶ 11.1, 11.2 (15 October 2013), available at [http://www.sahrc.org.za/home/21/files/CPR%20Report\\_comp.pdf](http://www.sahrc.org.za/home/21/files/CPR%20Report_comp.pdf).

<sup>493</sup> South African Human Rights Commission Act §§15, 16

<sup>494</sup> John S Mokele and Joyce Khutsoane, School Related Gender-based Violence. Violence against Women and Girls: A South African Perspective( 2013) (on file with authors).

<sup>495</sup> Id.

<sup>496</sup> Id.

<sup>497</sup> A CGE official stated that the CGE lacks funding to transform the concept note into an operational project with a definite timeframe. Telephone interview with CGE official (18 September 2013).

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